TRANSCRIPT OF RECORD

*** *** *** *** *** *** *** *** *** *** *** *** ***

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 195 .

No. 1053

HARTE-HANKS NEWSPAPERS, ABILENE,
TEXAS, ET AL.,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

--ooOoo--

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA,
UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A. D., 1957, before the Honorable Richard T. Rives, the Honorable Elbert P. Tuttle and the Honorable Ben F. Cameron, Circuit Judges:

UNITED STATES OF AMERICA,

Appellant,

versus

HARTE-HANKS NEWSPAPERS, ABILENE, TEXAS, ET AL.,

Appellees.

BE IT REMEMBERED, That heretofore, to-wit, on the 7th day of October, A. D., 1957, a transcript of the record in the above styled cause, pursuant to an appeal from the United States District Court for the Northern District of Texas, was filed in the office of the Clerk of the said United States Court of Appeals for the Fifth Circuit which said transcript was filed and docketed in said Court of Appeals as No. 16927, as follows, to-wit:-

--ooOoo--

TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 16927

UNITED STATES OF AMERICA,

Appellant,

versus

HARTE-HANKS NEWSPAPERS, ABILENE, TEXAS, ET AL,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

(ORIGINAL RECORD RECEIVED OCTOBER 7, 1957)

U. S. COURT OF APPEALS
FILED OCTOBER 7, 1957

EDWARD W. WADSWORTH,
Clerk

U. S. COURT OF APPEALS
FILED
OCT 7 1957

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UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

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--ooOoo--

TRANSCRIPT OF RECORD.

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 16927

UNITED STATES OF AMERICA,

Appellant,

versus

HARTE-HANKS NEWSPAPERS, ABILENE, TEXAS, ET AL,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

(ORIGINAL RECORD RECEIVED OCTOBER 7, 1957)

U. S. COURT OF APPEALS
FILED OCTOBER 7, 1957

EDWARD W. WADSWORTH,
Clerk

CAPTION

Be it Remembered that at a term of the United States District Court for the Northern District of Texas, at Fort Worth, Texas, the Honorable Wm. H. Atwell, United States District Judge, presiding, the following causes came on for hearing and were heard, to-wit:

MISCELLANEOUS MATTER NO. 2

In the matter of SUBPOENAS DUCES TECUM Commanding Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company, Greenville, Texas, Marshall Publishing Company, Marshall, Texas, and Matt Sheley to appear and produce certain documents before the Grand Jury for the Northern District of Texas, Fort Worth Division, Petitioners.

MISCELLANEOUS MATTER NO. 3

In the Matter of SUBPOENA DUCES TECUM Commanding Denison Herald, Inc. to appear and produce certain documents before the Grand Jury for the Northern District of Texas, Fort Worth Division. Petitioners.

(Title Omitted)

TO THE HONORABLE WILLIAM H. ATWELL, DISTRICT JUDGE:

I.

Harte-Hanks Newspapers, Abilene, Texas, shows to the Court:

1. That heretofore there was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Harte-Hanks Newspapers, Abilene, Texas, and commanding said Harte-Hanks Newspapers to appear in the United States District Court for said District, at the United States Courthouse in the City of Dallas, Texas, on the 5th day of August, 1957, to testify before the grand jury, and bring certain documents described in a paper called an "annex" and attached to said subpoena. Said subpoena was served on June 14, 1957, and a copy of an unsigned, undated subpoena, without seal, was left with a representative of Harte-Hanks Newspapers. The copy of the purported subpoena and the list setting forth the desired information and records is attached and marked "Exhibit A".

II.

Banner Publishing Company, Greenville, Texas, shows to the Court:

1. That heretofore there was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Banner Publishing Company, Greenville, Texas, and commanding said Banner Publishing Company to appear in the United States District Court for said District, at the United States Courthouse in the City of Dallas, Texas, on the 5th day of August, 1957, to testify before the grand jury, and bring certain documents described in a paper called an "annex" and attached to said subpoena. Said subpoena was served on July 6, 1957, and a copy of an unsigned, undated subpoena, without seal, was left with a representative of Banner Publishing Company. The copy of the purported subpoena and the list setting forth the desired information and records is attached and marked "Exhibit B".

III.

The Marshall Publishing Company, Marshall, Texas, shows to the Court:

1. That heretofore there was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Marshall Publishing Company, Marshall, Texas, and commanding said Marshall Publishing Company to appear in the United States District Court for said District, at the United States Courthouse in the City of Dallas, Texas, on the 5th day of August, 1957, to testify before the grand jury,

and bring certain documents described in a paper called an "annex" and attached to said subpoena. Said subpoena was served on July 22, 1957, and a copy of an unsigned subpoena, dated July 17, 1957, without seal, was left with a representative of Marshall Publishing Company. A copy of the purported subpoena and the list setting forth the desired information and records is attached and marked "Exhibit C".

IV.

Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas, shows to the Court:

1. That heretofore there was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas, and commanding said Matt Sheley to appear in the United States District Court for said District, at the United States Courthouse in the City of Dallas, Texas, on the 7th day of August, 1957, to testify before the grand jury. Said subpoena was served on July 20, 1957, and a copy of an unsigned subpoena, dated July 12, 1957, without seal, was handed to said Matt Sheley. A copy of the purported subpoena is attached and marked "Exhibit D".

V.

Rule 17(d), The Federal Rules of Criminal Procedure, provides:

> "A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law."

VI.

The attempted service on Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company, Greenville, Texas, Marshall Publishing Company, Marshall, Texas and Matt Sheley did not conform to the requirements of the Rules, and said subpoenas should be suppressed.

VII.

Prior to the time that any of the above process was issued, a representative of the United States Government requested the privilege to examine certain letters, papers and records which had passed between the above named corporations and corporate officers. The request was made of one of the attorneys for one or more of the above named parties. Said attorney agreed to submit such letters, papers and records for

examination by said representative upon the condition that none of them would be used in any manner in the prosecution of any action against any person or company or corporation named or referred to therein. Said papers were submitted to said representative of the Government upon the terms above stated. Said process now issued calls for the production before the grand jury of some, if not all, of the papers which were submitted to the Government representative. The use of any of said papers in any attempted prosecution would be in violation of the condition; and the Court should suppress the subpoenas and order that the above stated condition should be respected.

WHEREFORE, movants pray that the subpoenas be suppressed and the movants relieved of any duty to obey said faulty and defective attempts to issue and serve said subpoenas; and said condition fully respected.

McMAHON, SMART, WALTER,
SPRAIN & WILSON
By s/ T. J. McMAHON
Post Office Box 1440
Abilene, Texas

s/ DAN MOODY
DAN MOODY
Capital National Building
Austin, Texas

Attorneys for Movants

EXHIBIT A

AO Form No. 110 (Rev. 7-50)
Subpoena to Testify Before Grand Jury

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

To Harte-Hanks Newspapers
Abilene, Texas

You are hereby commanded to appear in the United States District Court for the Northern District of Texas at U. S. Courthouse in the city of Dallas, Texas on the 5th day of August 1957 at 9:30 o'clock A.M. to testify before the Grand Jury and bring with you the documents described in the attached annex.

This subpoena is issued on application of the United States

Clerk

Date , 19

By

Deputy Clerk

RETURN

Received this subpoena at on
and on at I served it on the
within named by delivering a
copy to h and tendering to h the fee for one day's
attendance at the mileage allowed by law.

Date , 19

By

Service Fees

Travel $
Services ———
Total $

For information concerning this subpoena call:

Henry M. Stuckey
Antitrust Division
U. S. Department of Justice
Washington 25, D. C.

ANNEX

To Subpoena Duces Tecum directed to Harte-Hanks Newspapers (hereinafter referred to as the "Corporation").

Unless otherwise stated each paragraph of this subpoena annex is limited to and covers the period from January 1, 1954 to the date of issuance thereof.

The term "Harte-Hanks chain" as used herein refers collectively to the following newspapers: *The Paris News*, Paris, Texas; *The Big Spring Herald*, Big Spring, Texas; *The Denison Herald*, Denison, Texas; *Abilene Reporter-News*, Abilene, Texas; *The Snyder Daily News*, Snyder, Texas; *Caller-Times*, Corpus Christi, Texas; *Marshall News-Messenger*, Marshall, Texas; *The Greenville Evening Banner* (now *The Greenville Herald-Banner*), Greenville, Texas and *The San Angelo Standard-Times*, San Angelo, Texas.

1. A copy of the articles of incorporation and by-laws of the Corporation together with all amendments thereto.

2. Profit and loss statements and balance sheets of the Corporation for the period stated.

3. Such of the Corporation's stockholders lists, registers, and other records as will show the names and addresses of those stockholders of the Corporation and any of its subsidiaries who own 10% or more of the voting capital stock of the Corporation. (By the term "subsidiaries" is meant a corporation which is engaged in the newspaper publishing business in Texas and which has among its stockholders persons who own 10% or more of the stock of the Corporation). (In

lieu of such records a certified list may be furnished giving the requested information).

4. All correspondence, memoranda or other communications passing between the Corporation its officers, directors, or employees and (1) Harte-Hanks and Company, its partners, employees or agents, (2) Banner Publishing Company, its officers, employees or agents, (3) any newspaper in the Harte-Hanks chain, its officers, employees or agents and (4) any other concern and any other person relating to the following:

(a) The acquisition of the *Greenville Morning Herald* newspaper by purchase, merger or otherwise.

(b) Competition between the *Greenville Morning Herald* and the *Greenville Evening Banner* newspapers.

(c) Relative strength of the *Greenville Morning Herald* and the *Greenville Evening Banner* newspapers.

(d) Means and methods, if any, to be used by the *Greenville Evening Banner*, its officers, employees, agents, subsidiaries or affiliates to drive the *Greenville Morning Herald* newspaper out of business or force it to sell, such as cutting subscription and advertising rates or forcing the *Greenville Morning Herald* to lose money.

(e) Support, financial or otherwise, to be given to the *Greenville Evening Banner* newspaper by the Corporation, Harte-Hanks and Company, or any other newspaper in the Harte-Hanks chain, if the *Greenville Evening Banner* became engaged in a competitive situation with the *Greenville Morning Herald* newspaper.

EXHIBIT B

To Banner Publishing Company
Greenville, Texas

You are hereby commanded to appear in the United States District Court for the Northern District of Texas at U. S. Courthouse in the city of Dallas, Texas on the 5th day of August 1957 at 9:30 o'clock A. M. to testify before the Grand Jury and bring with you the documents described in the attached annex.

This subpoena is issued on application of the United States.

.....
Clerk

Date . 19 .

By

Deputy Clerk

RETURN

Received this subpoena at on
and on at I served it on the
within named by delivering a
copy to h and tendering to h the fee for one day's
attendance at the mileage allowed by law.

Date , 19

By

Service Fees

Travel $
Services
Total $

For information concerning this subpoena call:

Henry M. Stuckey
Antitrust Division
U. S. Department of Justice
Washington 25, D. C.

ANNEX

To Subpoena Duces Tecum directed to the Banner Publishing Company (hereinafter referred to as the "Company").

Unless otherwise stated each paragraph of this subpoena annex is limited to and covers the period from January 1, 1954 to the date of issuance thereof.

The term "Harte-Hanks chain" as used herein refers collectively to the following newspapers: *The Paris News*, Paris, Texas; *The Big Spring Herald*, Big Spring Texas; *The Denison Herald*, Denison, Texas; *Abilene Reporter-News*, Abilene, Texas; *The Snyder Daily News*, Snyder, Texas; *Caller-Times*, Corpus Christi, Texas; *Marshall News-Messenger*, Marshall, Texas; *The Greenville Evening Banner* (now *The Greenville Herald Banner*), Greenville, Texas and *The San Angelo Standard-Times*, San Angelo, Texas.

1. A copy of the articles of incorporation and bylaws of the Company together with all amendments thereto.

2. Profit and loss statements and balance sheets of the Company and the Herald Publishing Company for the period stated.

3. Such of the Company's stockholders lists, registers, and other records as will show the names and addresses of those stockholders of the Company and any of its subsidiaries who own 10% or more of the voting capital stock of the Company. (By the term "subsidiaries" is meant a corporation which is engaged in the newspaper publishing business in Texas and which has among its stockholders persons who own 10% or more of the stock of the Company). (In lieu of such

records a certified list may be furnished giving the requested information).

4. Circulation statements (including net paid circulation and net press run statements) for the *Greenville Evening Banner* newspaper for the period January 6, 1954 to November 17, 1956 and for the *Greenville Herald-Banner* newspaper for the period November 17, 1956 to date.

5. Statements showing subscription rates for the *Greenville Evening Banner* (including such documents and statements which will show the rates for city, county, mail and any other type delivery, with effective dates of all rate changes) for the period January 6, 1954 to November 17, 1956 and for the *Greenville Herald-Banner* newspaper for the period November 18, 1956 to date. (In lieu of such records a certified list may be furnished giving the requested information.)

6. A copy of each contract entered into by or on behalf of the Company or the *Greenville Evening Banner* newspaper with national advertisers or their advertising agencies during the period January 1, to October 19, 1956.

7. Statements showing the dollar volume of revenues received from national and local advertisers respectively for advertising published in the *Greenville Evening Banner* newspaper for each of the years 1954, 1955 and 1956.

8. A copy of each invoice showing advertising published in the *Greenville Evening Banner* newspaper at less than its published or customary rate and a copy of each invoice showing a rerun of the same advertising for one-half or less than one-half of its published or customary rate, during the period stated.

9. A copy of each contract entered into by or on behalf of the Company or the *Greenville Evening Banner* newspaper with news, wire and feature furnishing agencies or services for the period January 1 to October 19, 1956.

10. A copy of each invoice showing the purchase by or on behalf of the Company or the *Greenville Evening Banner* newspaper of newsprint for the period January 1 to October 19, 1956. (In lieu of such invoices a certified list may be furnished giving the name and address of the manufacturer or supplier of such supplies together with the date and the amount of the purchase).

11. A copy of each promissory note or other document showing an indebtedness by the Company to any person, firm, partnership or corporation during the period stated.

12. All correspondence, memoranda or other communications passing between the Company, its officers, directors, or employees and (1) Harte-Hanks and Company, its partners, employees or agents, (2) Harte-Hanks newspapers, its officers, employees or

agents, (3) any other newspapers in the Harte-Hanks chain, its officers, employees or agents and (4) any other concern and any other person, relating to the following:

(a) The acquisition of the *Greenville Morning Herald* newspaper by purchase, merger or otherwise.

(b) Competition between the *Greenville Morning Herald* and the *Greenville Evening Banner* newspapers.

(c) Relative strength of the *Greenville Morning Herald* and the *Greenville Evening Banner* newspapers.

(d) Means and methods, if any, to be used by the *Greenville Evening Banner*, its officers, employees, agents, or affiliates to drive the *Greenville Morning Herald* newspaper out of business or force it to sell, such as cutting subscription and advertising rates or forcing the *Greenville Morning Herald* to lose money.

(e) Support, financial or otherwise, to be given to the *Greenville Evening Banner* newspapers by Harte-Hanks and company, Harte-Hanks Newspapers or any other newspapers in the Harte-Hanks chain, if the *Greenville Evening Banner* became engaged in a competitive situation with the *Greenville Morning Herald* newspaper.

EXHIBIT C

To Marshall Publishing Company
Marshall, Texas

You are hereby commanded to appear in the United States District Court for the Northern District of Texas at United States Courthouse in the city of Dallas, Texas on the 5th day of August 1957 at 9:30 o'clock A.M. to testify before the Grand Jury and bring with you the documents described on the attached annex.

This subpoena is issued on application of the United States.

Clerk

Date July 17, 1957

By

Deputy Clerk

RETURN

Received this subpoena at on
and on at I served it on the
within named by delivering a copy to h and tendering to h the fee for one day's attendance at the mileage allowed by law.

,

Date . 19

By _____

Service Fees

Travel	$
Services	_____
Total	$

ANNEX

To Subpoena Duces Tecum directed to Marshall Publishing Company (hereinafter referred to as the "Corporation").

Unless otherwise stated each paragraph of this subpoena annex is limited to and covers the period from January 1, 1954 to the date of issuance thereof.

The term "Harte-Hanks chain" as used herein refers collectively to the following newspapers: *The Paris News*, Paris, Texas; *The Big Spring Herald*, Big Spring, Texas; *The Denison Herald*, Denison, Texas; *Abilene Reporter-News*, Abilene, Texas; *The Snyder Daily News*, Snyder, Texas; *Caller-Times*, Corpus Christi, Texas; *Marshall News-Messenger*, Marshall, Texas; The *Greenville Evening Banner* (now *The Greenville Herald-Banner*), Greenville, Texas and *The San Angelo Standard-Times*, San Angelo, Texas.

1. All correspondence, memoranda or other communications passing between the Corporation, its officers, directors, or employees and (1) Harte-Hanks and

Company, its partners, employees or agents, (2) Banner Publishing Company, its officers, employees or agents, (3) any newspaper in the Harte-Hanks chain, its officers, employees or agents and (4) any other concern and any other person, relating to the following:

(a) The acquisition of the *Greenville Morning Herald* newspaper by purchase, merger or otherwise.

(b) Competition between the *Greenville Morning Herald* and the *Greenville Evening Banner* newspapers.

(c) Relative strength of the *Greenville Morning Herald* and the *Greenville Evening Banner* newspapers.

(d) Means and methods, if any, to be used by the *Greenville Evening Banner*, its officers, employees, agents, subsidiaries or affiliates to drive the *Greenville Morning Herald* newspaper out of business or force it to sell, such as cutting subscription and advertising rates or forcing the *Greenville Morning Herald* to lose money.

(e) Support, financial or otherwise, to be given to the *Greenville Evening Banner* newspaper by the Corporation, Harte-Hanks and Company, or any other newspaper in the Harte-Hanks chain, if the *Greenville Evening Banner* became engaged in a competitive situation with the *Greenville Morning Herald* newspaper.

EXHIBIT D

To Matt Sheley
Publisher, The Greenville
Herald-Banner
Greenville, Texas

You are hereby commanded to appear in the United States District Court for the Northern District of Texas at United States Courthouse in the city of Dallas, Texas on the 7th day of August 1957 at 9:30 o'clock A.M. to testify before the Grand Jury and *bring with you*

This subpoena is issued on application of the United States.

Clerk

Date July 12, 1957

By

Deputy Clerk

RETURN

Received this subpoena at on
and on at I served it on the
within named by deliver-
ing a copy to h and tendering to h the fee for one
day's attendance at the mileage allowed by law.

Date , 19

By

Service Fees

Travel	$
Services	———
Total	$

MOTION TO SUPPRESS SUBPOENA

Filed July 30, 1957.

(Title Omitted)

TO THE HONORABLE WILLIAM H. ATWELL, JUDGE OF SAID COURT:

Denison Herald, Inc. shows to this Honorable Court:

I.

That heretofore there was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Denison Herald, Inc. and commanding said Denison Herald, Inc. to appear in the United States District Court for said District, at the United States Courthouse in the City of Dallas, Texas on the 5th day of August, 1957 to testify before the grand jury and bring certain documents described in

a paper called an "annex" and attached to said subpoena. Said subpoena was served on July 23, 1957 and a copy of an unsigned subpoena without seal was left with the representative of Denison Herald, Inc. A copy of the purported subpoena and the list setting forth the desired information and records is attached and marked "Exhibit A."

II.

Rule 17(d) of the Federal Rules of Criminal Procedure, provides:

> "A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law."

III.

The attempted service on Denison Herald, Inc. did not conform to the requirements of the rules, and said subpoena should be suppressed.

IV.

Prior to the time that the above subpoena was issued, a representative of the United States Government requested the privilege of examining certain letters, papers and records which had passed between the

above-named corporation and various other corporations and their officers. The request was made of one of the attorneys for one or more of said parties. Said attorney agreed to submit such letters, papers, and records for examination by said representative, upon the condition that none of them would be used in any manner in the prosecution of any action against any person or company or corporation named or referred to therein. Said papers were in fact submitted to said representative of the Government upon the express condition aforesaid. Said process now issued calls for the production before the grand jury of some if not all of the papers which were submitted to the Government representative. The use of any of said papers in any attempted prosecution would be in violation of such condition and agreement, and the Court should suppress this subpoena and order that the above-stated condition should be respected.

WHEREFORE, movant prays that the subpoena be suppressed and movant relieved of any duty to obey said faulty and defective attempts to issue and serve said subpoena; further prays that said condition upon which examination of files was permitted be required to be respected.

DAN MOODY
Austin, Texas

McMAHON, SMART WALTER,
SPRAIN & WILSON
Abilene, Texas

By /s/ T. J. McMAHON

Attorneys for movant

EXHIBIT A

AO Form No. 110 (Rev. 7-50)
Subpoena to Testify Before Grand Jury

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

TO Denison Herald, Inc.
Denison, Texas

You are hereby commanded to appear in the United States District Court for the Northern District of Texas at United States Courthouse in the city of Dallas, Texas on the 5th day of August 1957 at 9:30 o'clock A.M. to testify before the Grand Jury and bring with you the documents described on the attached annex.

This subpoena is issued on application of the United States.

Clerk

Date July 17, 1957

By .....
Deputy Clerk

RETURN

Received this subpoena at ..... on .....
and on ..... at ..... I served it on the
within named ..... by delivering a copy to h and tendering to h the fee for one day's attendance at the mileage allowed by law.
Date ..... , 19 .

By .....

Service Fees

Travel $
Services _____
Total $

ANNEX

To Subpoena Duces Tecum directed to Denison Herald, Inc. (hereinafter referred to as the "Corporation").

Unless otherwise stated each paragraph of this subpoena annex is limited to and covers the period from January 1, 1954 to the date of issuance thereof.

The term "Harte-Hanks chain" as used herein refers collectively to the following newspapers: *The Paris News*, Paris, Texas; *The Big Spring Herald*, Big

Spring, Texas; *The Denison Herald*, Denison, Texas; *Abilene Reporter-News*, Abilene, Texas; *The Snyder Daily News*, Snyder, Texas; *Caller-Times*, Corpus Christi, Texas; *Marshall News-Messenger*, Marshall, Texas; *The Greenville Evening Banner* (now *The Greenville Herald-Banner*), Greenville, Texas and *The San Angelo Standard-Times*, San Angelo, Texas.

1. All correspondence, memoranda or other communications passing between the Corporation, its officers, directors, or employees and (1) Harte-Hanks and Company, its partners, employees or agents, (2) Banner Publishing Company, its officers, employees or agents, (3) any newspaper in the Harte-Hanks chain, its officers, employees or agents and (4) any other concern and any other person, relating to the following:

(a) The acquisition of the *Greenville Morning Herald* newspaper by purchase, merger or otherwise.

(b) Competition between the *Greenville Morning Herald* and the *Greenville Evening Banner* newspapers.

(c) Relative strength of the *Greenville Morning Herald* and the *Greenville Evening Banner* newspapers.

(d) Means and methods, if any, to be used by the *Greenville Evening Banner*, its officers, employees, agents, subsidiaries or affiliates to drive the *Green-*

ville Morning Herald newspaper out of business or force it to sell, such as cutting subscription and advertising rates or forcing the *Greenville Morning Herald* to lose money.

(e) Support, financial or otherwise, to be given to the *Greenville Evening Banner* newspaper by the Corporation, Harte-Hanks and Company, or any other newspaper in the Harte-Hanks chain, if the *Greenville Evening Banner* became engaged in a competitive situation with the *Greenville Morning Herald* newspaper.

OPINION OF THE COURT

Filed August 9, 1957.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION
AT DALLAS

IN THE MATTER OF SUBPOENAS
DUCES TECUM COMMANDING THAT
HARTE-HANKS NEWSPAPERS, ABILENE,
TEXAS, BANNER PUBLISHING CO.,
GREENVILLE, TEXAS, MARSHALL
PUBLISHING CO., MARSHALL, TEXAS
AND MATT SHELEY, AND DENISON
HERALD, INC., ANDREW B. SHELTON,

TO APPEAR AND PRODUCE CERTAIN DOCUMENTS BEFORE THE GRAND JURY FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

Mr. Dan Moody, Austin, Texas, and
Mr. T. J. McMahon, Abilene, Texas
—for the Newspapers;

Mr. Paul Owens and Mr. Henry Stuckey,
both of Washington, D.C. and Mr.
John C. Ford, Dallas, Texas
for the Government.

This motion is made to suppress subpoenas. So far as the Clerk's docket shows here, there is no memorandum showing that the only complainants here are seeking any other relief save and except new subpoenas.

After having heard the testimony, however, and using the chancellor's power to pass upon the credibility of the witnesses who have testified, I am of the opinion and find that the Defendants, who and which were being exposed for the divulgence of testimony which could be used before the Grand Jury in a criminal investigation; that such admonition and pledge was exacted by the attorney for these respective publications, and that that understanding, whether it was agreed to by the Government or not is quite immaterial, was to the effect that such information, as, is and was furnished, should not be used in any criminal in-

vestigation or by the Grand Jury for such purpose. I think the testimony further demands that the Court recognize from this testimony here that the purpose of this was for criminal indictments to be sought and found by the Grand Jury, which was then in session at Dallas, Texas.

Have an order, please, supporting what I have said and found here, okayed by the other side as to form. This is a country of great liberty, Gentlemen, and we must all stand for it. This information must not be used before the Grand Jury for criminal investigation.

WM. H. ATWELL,
United States District Judge.

OPINION OF THE COURT

Filed August 9, 1957.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS,

DALLAS DIVISION

HARTE-HANKS NEWSPAPERS, ABILENE, TEXAS, BANNER PUBLISHING COMPANY, GREENVILLE, TEXAS, MARSHALL PUBLISHING COMPANY, MARSHALL, TEXAS, MATT SHELEY and DENISON HERALD, INC., ANDREW B. SHELTON

vs.

UNITED STATES OFFICERS AND JURY

Dan Moody, Austin, Texas and
T. J. McMahon, Abilene, Texas,
for the Plaintiffs;

Paul Owens and Henry Stuckey, Assistant
Attorneys General, Washington, D.C., and
John C. Ford, Assistant United States Attorney,
Dallas, Texas,
for the United States.

The plaintiffs move to suppress subpoenas, and to deny the use of the material secured by the subpoenas before the grand jury.

The testimony discloses that the defendants were being investigated by the Federal grand jury which was in session, for the alleged violation of the Anti-trust statute, and the papers which were called for in, and secured by, the subpoenas, were material to that investigation.

The testimony also discloses, however, that the material that was taken from the complainants was furnished to the government's representatives after a conference with the attorneys for the newspapers wherein it was agreed that the government's representatives might retain the matter, provided the same was

not used in a criminal prosecution, or, in an attempt to secure a criminal indictment.

I find that the papers that were secured by the subpoenas were secured, as I have just said, by an agreement with the complainants' attorneys and that the papers should not be used before the grand jury in a criminal case.

It seems quite unnecessary to cite authorities, because one of the fundamentals of a free government denies the right of the servants of the people to secure evidence, or, testimony, in the manner indicated for use against the citizen. It would violate not only constitutional provisions, but the very thought of liberty and freedom itself.

An order may be drawn, therefore, denying the right to use such papers before the grand jury.

/s/ WM. H. ATWELL
United States District Judge

DONE at Dallas, Texas, on
this the 3rd day of August, 1957.

ORDER REQUESTED BY THE GOVERNMENT

Filed August 5, 1957.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

MISCELLANEOUS MATTER
NO. 2 AND 3

IN RE GRAND JURY SUBPOENAS
DUCES TECUM
COMMANDING THAT

HARTE-HANKS NEWSPAPERS, ABILENE, TEXAS
BANNER PUBLISHING COMPANY, GREENVILLE, TEXAS
MARSHALL PUBLISHING COMPANY, MARSHALL, TEXAS
DENISON HERALD, INC., DENISON, TEXAS

TO APPEAR AND PRODUCE CERTAIN
DOCUMENTS BEFORE THE GRAND JURY
FOR THE NORTHERN DISTRICT OF TEXAS,

DALLAS DIVISION

ORDER OF THE COURT

On this the 3rd day of August, 1957, came on to be heard the Motions of the above named corporations for an order to suppress subpoenas *duces tecum* issued for service upon said corporations and for enforcement of a condition which movants assert had been imposed incident to the voluntary furnishing of certain records and documents to Ural E. Horton, Special Agent of the Federal Bureau of Investigation, United States Department of Justice, on or about June 27, 1956; said condition being that the material so furnished would not be used against Harte-Hanks Newspapers, a corporation, in any criminal investigation or proceeding.

The Court having read the motions and examined the Clerk's docket and having been advised that new subpoenas *duces tecum* have been issued and served upon the above named corporations and since Counsel for movants admits that the new subpoenas conform in all respects to the requirements of the Federal Rules of Criminal Procedure, the issue of validity and proper service of the first subpoenas is now moot and need not be ruled upon.

However, the Court having heard the evidence and argument of Counsel is of the opinion and finds that the material furnished by Bruce Meador, Auditor for Harte-Hanks Newspapers, to Ural E. Horton, Special Agent of the Federal Bureau of Investigation on or about June 27, 1956, was upon the condition that such

material would not be used against Harte-Hanks Newspapers, a corporation, in any criminal investigation or proceeding and that it is immaterial whether said condition was agreed to by the Government or not.

It is further ordered that attorneys of the Antitrust Division, United States Department of Justice, be and hereby are enjoined and restrained from submitting to any Grand Jury the documents and papers furnished to Special Agent Horton of the Federal Bureau of Investigation on or about June 27, 1956.

It is further ordered by this Court that except for the documents furnished to Ural E. Horton, Special Agent of the Federal Bureau of Investigation on or about June 27, 1956, the material called for by subpoenas *duces tecum* directed to and served upon the above named corporations on August 1, 1957, shall be produced in accordance therewith.

United States District Judge

APPROVED AS TO FORM:

Attorneys for Movants

Attorneys for the United States

TRANSCRIPT OF PROCEEDINGS

Filed August 7, 1957.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION
AT DALLAS

IN THE MATTER OF

SUBPOENA DUCES TECUM
COMMANDING THAT HARTE-HANKS
NEWSPAPERS, ABILENE, TEXAS, BAN-
NER PUBLISHING COMPANY, GREEN-
VILLE, TEXAS, MARSHALL PUBLISHING
CO., MARSHALL, TEXAS, AND MATT
SHELEY, AND DENISON HERALD, INC.,
ANDREW B. SHELTON, TO APPEAR AND
PRODUCE CERTAIN DOCUMENTS
BEFORE THE GRAND JURY FOR THE
NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

* * * * *

APPEARANCES:

DAN MOODY, Austin, Texas,

McMAHON, SMART, WALTER, SPRAIN
& WILSON, Abilene, Texas,
By Mr. McMahon,

Appearing for the Movant.

H. M. STUCKEY, Trial Attorney, Antitrust
Division, Department of Justice,
Washington. D.C.

PAUL OWENS, Trial Attorney, Antitrust
Division, Department of Justice,
Washington, D.C.

JOHN C. FORD, Assistant United Attorney,
Dallas, Texas,

appearing for the Government.

BE IT REMEMBERED that on the 3rd day of August, 1957, the following proceedings were had in the above styled and numbered cause before the Honorable William H. Atwell, United States District Judge.

• • • • •

PROCEEDINGS

THE COURT: Are there formal orders desired by members of the bar?

If not, we have some matters today.

MR. MOODY: The Movant is ready on the motion. Shall I state the nature of it?

THE COURT: Yes, that is right.

MR. MOODY: In June of this year certain subpoenas were issued commanding the named persons to appear before the grand jury. Among them were subpoenas for certain corporations, and that they produce certain records.

The service did not conform to the rules, in this particular, it did not serve the person on whom the subpoena was directed.

THE COURT: Didn't what?

MR. MOODY: Didn't serve the subpoena upon the persons to whom the subpoena was directed in a manner to conform to the requirements of Rule 17-D, in this, that the officer left with the person summonsed, or attempted to be summonsed, an unsigned copy, an unsealed copy, of the subpoena, and the motion asks that those subpoenas be suppressed.

The rule to which I refer is Rule 17-D, which provides that a subpoena may be served by the Marshal or his deputy, or by any person who is not a party and is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for one day's attendance and the mileage allowed by law.

Now, the provision of the rule that was not respected, or not complied with, was they didn't give to the person summonsed a copy of the subpoena in the true

sense of the word, for the reason that the documents or papers that were given were not signed or sealed, and therefore—and not dated—and therefore, the service was not service in conformity with the rule, and we ask that the subpoenas be suppressed.

There is another motion.

THE COURT: What does the subpoena want?

MR. MOODY: The subpoenas were subpoenas duces tecum calling on the persons served to produce certain records and documents that are in the possession of the persons and corporations to whom the subpoenas were directed; and they read:

"A copy of Articles of Incorporation and bylaws of the corporation, together with all amendments thereto.

"Profit and loss statements and balance sheets of the corporation for the period stated.

"Such of the corporation's stockholders list, registers and other records as will show the names and addresses of those stockholders of the corporation and any of its subsidiaries who own ten per cent or more of the voting capital stock of the corporation (by the term "subsidiaries" is meant a corporation which is engaged in the newspaper publishing business in Texas and which has among its stockholders persons who own ten per cent or more of the stock of the corporation.) (In lieu of such records a certified list may be furnished giving the requested information.)

"All correspondence, memoranda or other communications passing between the corporation, its officers, directors or employees and Harte-Hanks & Company, its partners, employees or agents, Banner Publishing Company, its officers, employees or agents, any newspaper in the Harte-Hanks chain, its officers, employees or agents, and, any other concern, and any other person, relating to the following:

"The acquisition of the Greenville Morning Herald newspaper by purchase, merger, or otherwise.

"Competition between the Greenville Morning Herald and the Greenville Evening Banner newspapers.

"Relative strength of the Greenville Morning Herald and the Greenville Evening Banner newspapers.

"Means and methods, if any, to be used by the Greenville Evening Banner, its officers, employees, agents, subsidiaries or affiliates to drive the Greenville Morning Herald newspaper out of business or force it to sell, such as cutting subscription and advertising rates, or forcing the Greenville Morning Herald to lose money.

"Support, financial or otherwise, to be given to the Greenville Evening Banner Newspaper by the corporation, Harte-Hanks & Company, or any other newspaper in the Harte-Hanks chain, if the Greenville Evening Banner became engaged in a competitive situation with the Greenville Morning Herald newspaper."

THE COURT: It is a little long, isn't it?

MR. MOODY: Yes, it is a little long. And there are about four or five of them here but they are substantially the same material.

THE COURT: Let us hear from the other side?

MR. MOODY: There is another ground.

THE COURT: What is the other ground?

MR. MOODY: May I read it quickly, or state it quickly?

THE COURT: I want to know what the other ground is in the subpoena.

MR. MOODY: The other ground is that a representative of the United States Government came to Abilene and sought certain documents and papers that related to the business and affairs of the Harte-Hanks Newspapers, and possibly some other organizations.

These records, what they asked for, letters and correspondence and documents passing between persons interested, persons operating, owning the Harte-Hanks Newspapers and some newspapers in Abilene and Paris and various places in the state, some five or six. And in the request to see these papers the person making the request was told that they would not be made available to them for examination, except subject to the conditions that no use would be made of these papers that they desired to see in any criminal prosecution.

That is the substance of it.

So, they were accepted by the government agent on that condition and they were made available to him.

Now, then, the matter has progressed to the point where they are summonsing those papers, and where they are attempting to secure an indictment on a claimed violation of the antitrust law.

We have testimony to establish what I have stated, and we are taking the position that having accepted the papers on the conditions stated that they are not entitled to them and that they are now attempting to violate that condition upon which they were allowed to examine the papers, and that is a part of what they are summonsing. And we ask that that condition be enforced as against the parties now undertaking to obtain the papers and use them adversely in a grand jury investigation here in this court.

MR. STUCKEY: May it please the Court, the objections to the subpoenas were that they were not dated, that a copy was signed, and that no fees or mileage were paid to the witnesses.

28 United States Code, 1825, provides that the government does not have to advance fees or mileage to a witness subpoenaed in a government case. The rules cited by Mr. Moody do not require that the subpoenas be dated. As a matter of fact, the copies in the back of the Rules of Criminal Procedure do not even have a space for the subpoenas to be dated.

The third objection is that a copy was served on the persons summonsed. The rules provide specifically that a copy can be served. The rules do not say that it shall be a certified copy, signed copy or a notarized copy. It just says a copy.

However, in order that the grand jury proceedings will not be held up any longer, we have reissued the subpoenas complying in every detail to the objections made by Mr. Moody.

With respect to his alleged agreement that an attorney or representative of Harte-Hanks made with a government representative, we know nothing about any such agreement and we have two witnesses who will take the stand and testify to that when Your Honor is ready to hear witnesses in this case.

THE COURT: I am ready to hear them now. He alleges these things as facts. Now, you question some of the facts, and I will have to find what they are.

MR. MOODY: Are you ready to hear the testimony now?

THE COURT: Yes.

* * *

BRUCE MEADOR,

being first duly sworn, examined in chief by Mr. Moody, testified as follows:

Q State your name, please.

A Bruce Meador.

Q Where do you live?

A Abilene, Texas.

Q What business or occupation are you engaged in?

A I am employed by the Harte-Hanks Newspapers.

THE COURT: Employed by what?

A Harte-Hanks Newspapers.

Q (By Mr. Moody) How long have you been employed by the Harte-Hanks Newspapers?

A Ten years.

Q Do you recall in June, 1956 some person calling on you for the privilege of examining certain papers of the Harte-Hanks Newspapers?

A Yes, I do.

Q Speak out loud so we can all hear you.

A Yes, I do.

Q Do you recall the name of the gentleman that called at your office—if he did call at your office?

A Mr. U. E. Horton.

Q What request did he make of you?

A He asked for financial statements—he asked for financial statements of the various Harte-Hanks newspapers, statements regarding circulation, rate cards concerning rates of advertising sold, and I don't recall all of the matters he asked for; I have a letter in my pocket, if I may read it, the transmittal letter, sending this information to him.

Q Have you got any paper that would serve as a memorandum—I am not asking you to read the letter

—but do you have a paper that will serve to refresh your recollection as to the papers that were requested?

A Yes, I do have—

Q Speak out a little louder.

Yes, I believe I do have, balance sheets, balance statements and operating statements for the years June 30, 1951 through June 30, 1953, Banner Publishing Company, Greenville, Texas, balance sheet & operating statements of the Snyder Daily News, Big Spring Herald, Denison Herald, Paris News, Marshall News, Greenville Banner, Abilene Reporter-News, San Angelo Standard Times, Corpus Christi Times. The linage run from each of these papers for the same period.

I believe that covers what Mr. Horton asked for.

Q Now then, when this request was made of you what did you do about it?

A I told Mr. Horton I would go and talk with our attorney, Mr. T. J. McMahon.

Q Mr. McMahon is the gentleman sitting here on my right?

A Yes.

Q And did you go see Mr. McMahon?

A Yes, we did.

Q Does Mr. McMahon have some connection or association with the newspapers you are employed by?

A Yes. He is the attorney for the newspapers.

Q And is he a practicing attorney there in Abilene?

A In Abilene, yes sir.

Q In the general practice of law?

A He is also a trustee in the Hanks estate that has an interest in some of these papers.

Q Did you and the gentleman that called on you and requested permission to see those papers, did you all go to Mr. McMahon's office?

A Yes, we did.

Q What occurred when you got to Mr. McMahon's office?

A Mr. McMahon told Mr. Horton of a recent article in the Bar Association Journal concerning the inspection of records, and he told him that if this information was to be used in connection with criminal prosecution, he would not give him any information. He said that "We wish to cooperate with you; but I want to place you on notice that if it is to be used in connection with criminal prosecution, we do not intend to give you any information."

Q Did that gentleman make any response to that?

A He said he didn't know the purpose it was to be used for; he was requested to get that information, and Mr. McMahon said that he wanted him "to place a note in your report that we called this to your attention, and we are giving you that information on this condition."

Q What was the condition that you speak of?

A That it was not to be used in connection with criminal prosecution.

MR. MOODY: Take the witness.

THE COURT: Any cross, gentlemen.

CROSS EXAMINATION

BY MR. OWENS:

Q This was about June of 1956 that Mr. Horton of the Federal Bureau of Investigation called on you, is that correct?

A Well, it was possibly before June. I got the information for him on June 25 and mailed it to him, and I imagine it was about May that he was out there. I am not certain of the exact date.

Q I understand you to say he first came to your office, is that correct?

A Yes, he did.

Q Did he identify himself at that time?

A Yes, he did.

Q Did he exhibit to you a letter from the assistant attorney general requesting that your files be made available for his examination?

A He didn't exhibit a letter directed to me. He had a letter directed to him to get this information is my recollection.

Q I would like to show you a copy of a letter, Mr. Meador, from the assistant attorney general of the United States addressed to the Harte-Hanks Corporation, and I would like for you to read that letter.

A Mr. Gemberling, the man sitting back there, showed me this letter when he came. Mr. Horton did not have this letter.

Q This letter. But do you recall that Mr. Horton did exhibit a letter which stated, as this letter does, that "In connection with an investigation by this Department of alleged violation of federal anti-trust laws with respect to the newspaper industry, it is requested that you make available for examining by the bearer, an agent of the Federal Bureau of Investigation, such of your files as he may request."

A I did not see a letter similar to that. He had a letter directed to him and not to Harte-Hanks Corporation.

Q You do not recall being exhibited any such letter?

A He had a very detailed letter requesting all of this information; but it was not directed to any of our companies that I recall.

Q You will state under oath, Mr. Meador, that this letter was never exhibited to you, a copy of that letter, in connection with the visit of Special Agent Horton to your office?

A I said I do not recall seeing the letter. He did have another letter directed to him, which we followed in trying to get the information together.

Q I understand he had another letter giving him instructions about what he was to be inquiring about.

A He showed me his other letter. He may have showed me this letter. I do not recall it.

THE COURT: He says he does not recall it. He is under oath, counsel. He is testifying.

Q (By Mr. Owens) Do you recall what Special Agent Horton said to you when he opened his visit with you?

A We had a friendly visit. I do not recall the exact words. We have numerous business with Mr. Horton in connection with news stories for the newspapers. We had discussion that he knew Mr. Weiskamper, the managing editor. He had had no opportunity to meet me. We had a friendly conversation there for a few minutes. I do not recall the exact conversation.

Q Do you remember Mr. Horton stated to you that you were under no obligation to furnish the material that he requested?

A I do not recall whether he made that statement or not.

Q Do you recall his saying to you that you had a right to consult an attorney if you so desired before you furnished the information?

A I don't believe that he said that to me. I told him that I wished to talk to our attorney about the matter; that we knew nothing about the anti-trust laws, and that I preferred that I talk with our attorney before I gave him any information.

Q Do you recall his stating to you that any information provided pursuant to his request could be used in any Court of Law or as evidence in any proceedings?

A I do not recall it. It was a very informal visit.

THE COURT: All right. Call your next witness, if you have any, if you want any other witness.

MR. MOODY: Judge. Mr. McMahon here is an attorney at Abilene, and I am sure has been in your Court. He was approached on this matter, and he is an attorney in the case; but nevertheless, there is some testimony that I don't believe can be developed other than through him, and may he be permitted to testify?

THE COURT: Certainly. Certainly.

T. J. McMAHON,

being first duly sworn, examined in chief by Mr. Moody, testified on his oath as follows:

Q State your name, please, sir.

A T. J. McMahon.

Q Where do you live, Mr. McMahon?

A Abilene.

Q What profession are you engaged in?

A I am an attorney at law.

Q What is the name of your law firm, please?

A McMahon, Smart, Walter, Sprain & Wilson.

Q Mr. McMahon, you, of course, are familiar with the matter that is under investigation here, under discussion, are you not?

A I have been consulted about it.

Q Yes sir. Did Mr. Meador come to your office with a representative of the United States Government in connection with some request for access to papers and records of the Harte-Hanks newspapers?

A Mr. Meador came to my office, which is approximately one block from his office there in Abilene. I don't remember the month, but it was in May or June of 19—

THE COURT: Just answer his question.

A He did.

Q (By Mr. Moody) All right. Now, will you tell what occurred at that meeting, please, sir?

A Mr. Meador came to my office with this gentleman, Mr. Horton. I didn't remember his name. Mr. Horton exhibited his FBI credentials, and then told me that he was commissioned by his superiors to make some examinations and get some information from the files of the paper. I asked Mr. Horton myself what the purpose of the examination was. He stated that he did not know; that he is merely a field agent;

that he had the order to get this information and was there to do his job. I told Mr. Horton that I appreciated it; but I wanted to know whether or not the information that he was seeking was to be used by him in furtherance of any criminal prosecution. He stated that he did not know. He did not exhibit any letter to me relating to any anti-trust investigation whatsoever. I told him that since he did not know that we, nevertheless, wanted to cooperate with any legitimate aims of the government; but that I wanted his examination to be definitely on condition that what he learned or what he copied or the information that he got from our files, the files of my client, were not to be used by him in furtherance of any criminal prosecution. He stated that he didn't know whether it would be used in that manner or not, and I stated at that point, "You are required, I am sure, to file a report in connection with your fulfilling this task, and if you do file such a report, I would appreciate it very much if you would incorporate in the report the substance of this conversation and the condition that I have attached to your going into these files." And that was it.

Q Then, did you permit to see, or advise your clients to permit to see, the records?

A I certainly did.

Q Do you know how long he was engaged in examining the records?

A No I don't, Mr. Moody.

Q Has anyone called on you since that time asking permission to examine—

A No sir.

Q —these records?

A No sir.

Q Up to the time this subpoena was served, or the attempt was made to serve these subpoenas—I am saying that they were not rightly served—up to that time, had there been any further discussions between you and any representative of the United States Government about this matter?

A No.

Q Was your consenting or advising your client to permit this gentleman to examine the papers, was it upon the condition that the information obtained would not be used in any criminal—

THE COURT: Well, he has already testified to that. Any cross, gentlemen?

CROSS EXAMINATION

BY MR. OWENS:

Q Mr. McMahon, you have been in the practice of law how long?

A Since 1919.

Q Have you ever, in your practice of law, heard of any authority being given to the Federal Bureau of Investigation with respect to insulating persons

from prosecution on the basis of the information that they obtained?

A You mean a covenant of immunity?

Q Conferring immunity.

A I have heard of something like that. I haven't practiced criminal law; I haven't had a criminal case in many years; but I do know about the Fifth Amendment and how it can be gotten around by a grant of immunity, yes sir.

Q Have you ever heard of a case of the FBI—

A I don't know.

THE COURT: Let's try this case, counsel.

Q (By Mr. Owens) Did you undertake to place this condition in writing that you have testified to?

A I undertook to get it placed in writing in a sense that the gentleman would incorporate it in his report so that not only the examination that he was then conducting, but all future requests, would be governed by the condition that he was supposed to put in that report. He told me he would put it in there.

MR. OWENS: No further questions.

THE COURT: All right. Any other witness you wish to put on?

MR. MOODY: No sir.

Your Honor, we submit that the subpoenas should be—

THE COURT: All right. Do you want to argue this case, gentlemen?

MR. OWENS: If the Court please, the Government would like to place on the stand Special Agent Ural E. Horton of the Federal Bureau of Investigation.

THE COURT: All right. The other side closes?

MR. MOODY: Yes sir. This side closes.

URAL E. HORTON, JR.,

being first duly sworn, examined in chief by Mr. Owens, testified on his oath as follows:

Q In the month of June—

THE COURT: Wait a minute. Who have you got on the stand?

Q (By Mr. Owens) Would you state your name, please.

A Ural E. Horton, Jr.

Q And your occupation?

A I am a Special Agent of the Federal Bureau of Investigation.

Q Where are you located, Mr. Horton?

A At Abilene, Texas.

Q How long have you been with the Federal Bureau of Investigation?

A Since 1951.

Q About the month of June of 1956, did you have occasion to visit the offices of Mr. Meador?

A I did.

Q Would you state to the Court the purpose of your visit?

A On June 13 of 1956, I went to the offices of Mr. Meador after having previously made a telephone call and made an appointment.

THE COURT: Speak out so we can hear you.

A Yes sir. At that time, I presented myself as being a Special Agent, showed Mr. Meador my credentials, and advised him at that time that he did not have to furnish me with the information that was requested. Before that, I presented him a letter from the assistant attorney general, Mr. Barnes, of the United States, and in the letter, it was more or less an introduction of myself to Mr. Meador, or the proper official of the Harte-Hanks newspapers, that he had requested that certain information be furnished to me so that it might be reviewed by the Department. At that time, I advised Mr. Meador that, of course, he did not have to furnish me with the information; that anything that he did furnish me with could be used in Court, and that he was entitled to an attorney. We went over the certain specific questions that were asked by the Attorney General that he wished information on, and Mr. Meador furnished me with some organizational setup of the newspaper, the names of the people that were involved in the newspaper, and an exact setup of the organization. I at that time

furnished his secretary with a list of the specific items requested by the Attorney General's office. At that time, Mr. Meador stated that he desired to speak with his counsel, and I told him that would be quite agreeable with me, and he asked me to accompany him to see his counsel, Mr. McMahon.

Q Did you then go to Mr. McMahon's office?

A That is correct, sir.

Q Would you tell us what transpired in Mr. McMahon's office, to the best of your recollection?

A Well, to the best of my recollection, upon entering the office, I was introduced to Mr. McMahon. Mr. Meador advised him what my position was. Of course, I identified myself to him before talking to him, and Mr. Meador and Mr. McMahon conferred back and forth on the subject of what was requested by the Attorney General. Now, this letter, that was given to me by the Attorney General's office, was also shown to Mr. McMahon, inasmuch as it contained the statement for the information that was requested and also stated my position. It was an introduction of myself.

Q Would you tell me if this is a copy of the letter that you exhibited to Mr. Meador and Mr. McMahon?

A It is, sir.

Q I wonder if you would read that paragraph.

A It is directed to the Harte-Hanks Corporation, Greenville, Texas.

"Gentlemen:

"In connection with an investigation by this Department of alleged violations of the Federal Anti-trust Laws with respect to the newspaper industry, it is requested that you make available for examination by the bearer, an agent of the Federal Bureau of Investigation, such of your files as he may request.

"Your cooperation in this investigation will be very much appreciated.

"Sincerely yours,

"Stanley N. Barnes, Assistant Attorney General, Anti-trust Division."

Q What was the rest of the conversation in Mr. McMahon's office?

A The rest of the conversation, as I recall, was concerning the specific points that were requested, specific items which the Attorney General's office was interested in. Mr. Meador and Mr. McMahon, in conferring back and forth, I recall that Mr. Meador stated that he knew of no reason why the information should not be furnished; that they had nothing to hide, and one of the two gentlemen, I believe it was Mr. McMahon as near as my recollection will let me recall, made the statement that he saw no reason why these records should not be made available inasmuch as the points of the information that I supplied him at that time were a matter of public record, and that is all that I recall.

Q Did you accept the offer to make these documents available on any condition or understanding or agreement?

A No sir, I did not.

Q Did you specifically apprise them of the fact that they were not required to furnish the information?

A I don't recall having made that statement in the presence of Mr. McMahon.

Q Now, as a Special Agent of the Federal Bureau of investigation, do you have any authority to tell anybody that you are questioning or interviewing that the matters that they discuss with you will be such that they will be free from any prosecution concerning it?

A No sir.

Q Have you ever, in the time that you have been with the—

THE COURT: Let's try this case, counsel.

MR. OWENS: No further questions, then, your Honor.

THE COURT: Any cross, gentlemen?

MR. MOODY: Yes sir, briefly.

CROSS EXAMINATION

BY MR. MOODY:

Q This letter of May 15, the first is all one sentence, the first clause of it is: "In connection with an investigation of this Department of alleged violations of the Federal Anti-trust Laws with respect to the newspaper industry, it is requested that you make

available for examination by the bearer, an agent of the Federal Bureau of Investigation, such of your files as he may request."

Now, you mean to say this man, when you told him that you are investigating an anti-trust violation, he just said that he was ready to turn his papers over to you?

A As near as I can recall, yes sir.

Q Uh huh.

THE COURT: All right.

Q (By Mr. Moody) Now, then, did you — you spoke of a list being furnished?

A Yes sir.

Q You have that list with you?

A No sir, I do not.

Q Does counsel have it?

A I could not say, sir.

MR. OWENS: You are referring, Governor—

MR. MOODY: To the list he referred to, yes.

MR. OWENS: He, as I understand his testimony, said he read the information that the government was requesting they furnish.

MR. MOODY: You do not have it?

MR. OWENS: I believe it is in the Department file.

MR. MOODY: Do you have it here with you? If you have it, I would like to look at it.

MR. OWENS: I don't believe I could grant access to the Department files without some proper authority.

Q (By Mr. Moody) Did you make a report following your interview with Mr. McMahon?

A Yes sir.

Q Do you have a copy of that with you?

A No sir, I do not.

Q Do you know where a copy could be obtained?

A No sir.

MR. MOODY: Does counsel have a copy of his report?

MR. OWENS: The government has copies of the FBI report of Special Agent Horton, yes.

MR. MOODY: All right. May we see it?

MR. OWENS: I cannot offer that to you.

THE COURT: No, no.

MR. MOODY: How is that, your Honor?

THE COURT: No, no.

Q (By Mr. Moody) So your testimony is that the papers were turned over to you without any condition such as Mr. McMahon stated on the witness stand?

A The papers were not turned over to me at that time, sir.

Q When did you get access to the papers?

A On June 27, I received access. I never looked at the papers myself.

Q You never looked at the papers?

A No sir.

MR. MOODY: That is all.

THE COURT: All right. Call your next witness.

MR. OWENS: I have one brief redirect, your Honor.

THE COURT: All right.

THE WITNESS: May I make a statement here, Judge? By that I mean I did not—

THE COURT: Your questions will be asked you when they want anything out of you.

THE WITNESS: Yes sir.

THE COURT: We don't allow speeches, you know.

REDIRECT EXAMINATION

BY MR. OWENS:

Q What was the date of this visit you had?

THE COURT: He has already testified about that.

Q (By Mr. Owens) How long after that did you go and pick up the documents requested?

A Will you repeat that, please?

Q How long—or at what time did you pick up the documents that were requested?

A On June 27 of 1956.

Q Did you receive a letter when you picked up the documents from Mr. Meador?

A Yes sir, I did.

Q I show you this letter, and ask if this is a copy of the letter that you received when you picked up the documents?

A Yes sir, it is.

Q Is there anything in that letter that refers to an agreement or a condition under which the documents were furnished?

A No sir, there is nothing in the letter—

Q Thank you.

A —concerning that.

MR. OWENS: If your Honor would care to examine this letter—

THE COURT: I don't examine matters. If you want to read it to me, read it.

MR. OWENS: This is a letter dated June 25, 1956, to Mr. Ural E. Horton, Federal Bureau of Investigation, Abilene Office, Abilene, Texas.

"Dear Mr. Horton:

"Enclosed is information for the following newspapers recently requested by you:

"The Snyder Daily News

"The Big Spring Herald

"The Denison Herald

"The Paris News

"Marshall News Messenger

"The Greenville Banner

"The Abilene Reporter-News

"San Angelo Standard-Times

"Corpus Christi Caller-Times

"Advertising Rate Cards and or other Advertising Rate Information, Subscription Rates and Average Daily Circulation, Balance Sheets and Operating Statements for the years ended June 30, 1951 through June 30, 1953, for all of the papers except Banner Publishing Company, Greenville, Texas. This company was on a calendar year basis and balance sheets and operating statements are submitted for the calendar years December 31, 1951 through December 31, 1953. Balance sheets and operating statements for the calendar years 1951 through 1953 for the Greenville Banner are submitted from statements found in the office of this company at the time of purchase and were not verified by the writer. On June 30, 1954 the taxable fiscal year of the Greenville Banner

was changed to conform with the other newspapers in the group and balance sheets and operating statements for all companies listed above are submitted for the fiscal years ended June 30, 1954 and June 30, 1955. Individual balance sheets and operating statements for each of the companies for the nine months period ended March 31, 1956 are submitted.

"There is also submitted monthly linage reports for each quarter for the period 1951 through March 31, 1956 for all papers except the Greenville Banner. Linage reports are submitted for the Greenville Banner beginning July, 1954 through March, 1956. No monthly advertising linage reports are available for the period prior to the acquisition of control of the Greenville Banner by the present management. "Totals to Date": represents totals from July 1 to the date shown on the heading of each linage report.

"The only circulation records available for the period prior to the acquisition of the Greenville Banner is the published circulation figures furnished Editor and Publisher Year Book each year. In view of the fact that these figures in Editor and Publisher Year Book appear to have been grossly exaggerated by the former management, they have not been submitted.

"I would like to call your attention to the fact that in some cases it was necessary to use old advertising contracts which had rate cards printed on the back of them in order to be able to furnish you with the rate cards on the earlier years. For years where no rate cards are submitted there was no change in the rates.

"A letter written by Mr. Max Lale, publisher of the Greenville Banner to the writer is submitted, which explains the rate situation in Greenville concerning advertising. No published rate cards are available from the Greenville Banner.

"Please advise if we can furnish you with any additional information.

"Yours truly," and the letter is signed by Bruce B. Meador.

THE COURT: All right. Anything else?

MR. OWENS: No further questions, your Honor.

THE COURT: All right.

MR. MOODY: No further testimony.

THE COURT: Both sides close testimony?

MR. MOODY: Yes sir.

THE COURT: Do you want to argue the matter, gentlemen?

MR. MOODY: Judge, I just want to make a brief statement.

THE COURT: About how long do you want to argue, gentlemen?

MR. MOODY: Your Honor, I won't take ten minutes.

THE COURT: Is that satisfactory to the other side?

MR. STUCKEY: We will take half as much, your Honor.

THE COURT: All right.

MR. MOODY: If it please the Court, so far as the subpoenas are concerned, I think they should be suppressed.

In respect to the matter of the information obtained by the Government through the gentleman who just left the witness stand, I submit to your Honor that we have here the testimony of two witnesses, Mr. Meador and Mr. McMahon, to the effect that the papers supplied to the Government were with the understanding or on the condition that they would not be used in any criminal prosecution against the parties involved. Now, they went to the pains to state to Mr. McMahon and to Mr. Meador that they did not have to furnish any papers or make any statement; but according to the testimony of these two witnesses, there was a statement that the records were not to be available to them, would not be submitted to them, except subject to that condition. That is the sense of the testimony of these two witnesses and we submit that on that testimony that the Court should support the contention of the movants here that those records and facts obtained from them are not available to the Government and should not be used.

MR. OWENS: If your Honor please, the direct conflict in the testimony here between the Special Agent of the Federal Bureau of Investigation and Mr. Meador, of the Harte-Hanks newspapers, and their

attorney, Mr. McMahon, Mr. Horton has testified that he made no such agreement; that he had no such conversation: that he is without authority to make any such agreement or to grant any such immunity. In the testimony he explained that he advised that they were not obligated to furnish the information, advised Mr. Meador that he had a right to consult with counsel, advised Mr. Meador that any information that was furnished could be used in any Court of Law, in any proceedings, criminal or civil. He exhibited a letter of request from the assistant attorney general of the United States requesting that the information be made available. That letter of request contains nothing in the way of an offer of immunity in exchange for providing the information. He testified that after going to the counsel's office in the company of Mr. Meador that in that conversation he had no discussion about any condition or understanding or stipulation with respect to the circumstances under which he would obtain access. He later stopped at the office of Mr. Meador to pick up the documents containing the information requested; that at that time, there was a letter from Mr. Meador to Mr. Horton explaining the material that was being submitted. That letter, as I have read to the Court, contains no such condition, agreement or understanding such as we submit that in the normal course of events, any counsel or any person who was furnishing the information under such circumstances and had occasion to write a letter respecting that would have normally, logically and reasonably incorporated the fact in that something like, well, "Of course, this submitted in accordance with the terms

of our understanding of such and such a date," and then set out what the nature of the agreement was. We respectfully contend, your Honor, that there was no such agreement or stipulation made.

I think that probably the Court could take judicial notice of the fact that the Federal Bureau of Investigation has no such authority to make such agreements as that; that if such agreements are made, they are made after consultation with attorneys for the Government, after a consideration of the alternatives that are open to the Government.

We submit that the investigation by the agent of the Federal Bureau of Investigation was without any stipulation or condition with respect to the use of the information that was obtained. Obviously, there would be no purpose of conducting an investigation of alleged violations of the people that they were inquiring of and opening the investigation with a grant of immunity. It appears that the only way the Government would proceed in a manner like that would be in making a historical record and with no intent of enforcing the law.

THE COURT: You have issued new subpoenas, I take it.

MR. OWENS: Yes, your Honor. There are four corporations and one gentleman, Andrew B. Shelton, is the secretary of four of them. New subpoenas—the copies have been sealed and signed—have been served upon him and upon the individual—

THE COURT: I say you have issued new subpoenas, and as the Governor has told me, have you received the new subpoenas?

MR. MOODY: They came yesterday, and there are three of them—four of them here, and they are conformed to the rule.

THE COURT: Well, that is all I wanted to know.

MR. OWENS: That issue is moot, your Honor.

THE COURT: All right.

This motion is made to suppress subpoenas. So far as the Clerk's docket shows here, there is no memorandum showing that the only complaintants here are seeking any other relief save and except new subpoenas.

MR. MOODY: No, your Honor.

THE COURT: After having heard the testimony, however, and using the Chancellor's power to pass upon the credibility of the witnesses who have testified, I am of the opinion and find that the Defendants, who and which were being exposed for the divulgence of testimony which could be used before the Grand Jury in a criminal investigation, that such admonition and pledge was exacted by the attorney for these respective publications, and that that understanding, whether it was agreed to by the Government or not is quite immaterial, was to the effect that such information, as is and was furnished, should not be used in any criminal investigation or by the Grand Jury for such purpose. I think the testimony further demands

that the Court recognize from this testimony here that the purpose of this was for criminal indictments to be sought and found by the Grand Jury, which was then in session at Dallas, Texas.

"Have an order, please, supporting what I have said and found here, okayed by the other side as to form. This is a country of great liberty, gentlemen, and we must all stand for it. This information must not be used before the Grand Jury for criminal investigation.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION
AT DALLAS

IN THE MATTER OF SUBPOENAS DUCES TECUM COMMANDING THAT HARTE-HANKS NEWSPAPERS, ABILENE, TEXAS, BANNER PUBLISHING COMPANY, GREENVILLE, TEXAS, MARSHALL PUBLISHING CO., MARSHALL, TEXAS, AND MATT SHELEY, AND DENISON HERALD, INC., ANDREW B. SHELTON, APPEAR AND PRODUCE CERTAIN DOCUMENTS BEFORE THE GRAND JURY FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

APPEARANCES:

DAN MOODY, Austin, Texas,

McMAHON, SMART, WALTER, SPRAIN & WILSON, Abilene, Texas, By Mr. McMahon,

appearing for the Movant.

H. M. STUCKEY, Trial Attorney, Antitrust Division, Department of Justice, Washington, D.C.

PAUL OWENS, Trial Attorney, Antitrust Division, Department of Justice, Washington, D.C.

JOHN FORD, Assistant United States Attorney, Dallas, Texas,

appearing for the Government.

BE IT REMEMBERED that on the 5th day of August, 1957, the following proceedings were had in the above styled and numbered cause before the Honorable William H. Atwell, United States District Judge.

PROCEEDINGS

THE COURT: Are there formal orders desired by members of the Bar?

MR. McMAHON: I have requested the Clerk to present an order pursuant to the announcement of the Court last Saturday morning.

THE COURT: How is that?

MR. McMAHON: I have requested the Clerk to present to the Court a formal order pursuant to the announcement of the Court in connection with the Harte-Hanks Newspapers.

If the Court please, a copy of this order has been presented, as per the Court's direction, to opposing counsel for approval as to form. They have declined to approve the proposed order as drawn as to form.

THE COURT: What is the objection, gentlemen, to the order?

MR. OWENS: If your Honor please, the Government contends that the Court, in this circumstance, is without jurisdiction to enter an order of this nature, and if your Honor please, we would like to present a legal argument in support of that contention, in addition to which we have objections to the form of the order in its recital of what the ruling is.

THE COURT: Well, I have already heard you gentlemen as to whether the Court should issue an order or not, and I have passed on that, and you needn't argue that any more. The only objection I see

in this, in the last paragraph, "It is further the order of the Court that all subpoenas duces tecum heretofore issued and caused to be served on the Movants, their officers or agents, be and are hereby suppressed."

MR. OWENS: Your Honor, we have a number of objections to the scope of the order. We have prepared an alternate order, which we would be pleased to pass up to the Clerk.

THE COURT: Well, both of you can work your order over again. I didn't crush the subpoenas. Here they are, both of them. The subpoenas are all right. It was agreed to here. There was nothing the matter with the subpoenas. The Court merely denied the right to use the material before the Grand Jury in a criminal matter. Now, you gentlemen don't need any professor of law. Go out and prepare the order like the Court gave it.

MR. STUCKEY: Your Honor, may I point out that there were two investigations in this case, and the one concerned here Saturday concerned just one investigation. May we discuss the second investigation?

THE COURT: What do you mean, "the second investigation"?

MR. STUCKEY: At two different times, material was gotten from the Defendants.

THE COURT: It doesn't make any difference how many different times there were. They got them under the understanding they would not be used in a

criminal case. Now, go out and prepare the order, gentlemen, in accordance with what the Court decided.

I, Richard A. Ward, certify that during the trial of the foregoing styled and numbered cause, I was the official shorthand reporter, and took in shorthand the proceedings on said trial, and have transcribed the same as shown by the above and foregoing 44 pages, and that said transcript is true and correct.

This 5th day of August, 1957.

s/ RICHARD A. WARD
Court Reporter.

ORDER THAT RESTRICTIONS AND CONDITIONS IMPOSED BY MOVANTS BE RESPECTED AND ENFORCED, ETC.

Filed August 5, 1957.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

MISCELLANEOUS MATTER NO. 2 AND 3
IN THE MATTER OF SUBPOENAS
DUCES TECUM

COMMANDING THAT
ANDREW B. SHELTON AS SECRETARY OF
AND THE FOLLOWING CORPORATIONS
HARTE-HANKS NEWSPAPERS, Abilene, Texas
BANNER PUBLISHING COMPANY, Greenville, Texas
MARSHALL PUBLISHING COMPANY, Marshall, Texas
DENISON HERALD, INC., Denison, Texas

APPEAR AND PRODUCE CERTAIN
DOCUMENTS BEFORE THE GRAND JURY
FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION

ORDER OF THE COURT

On this the 3rd day of August, 1957, came on to be heard the Motions of the above named movants for orders suppressing the subpoenas duces tecum issued for service upon the above named corporations and individuals, and for enforcement of the conditions imposed preliminary to any examination or inspection by agents of the Government of the books, records and files of the movants, under which condition representatives of the Government preliminary to any subpoena being served did in fact examine, inspect and copy books, records, files and correspondence which were in possession of Movants under the above stated condition imposed by Movants.

The Court having read the pleadings and heard the evidence and argument of Counsel is of the opinion and finds that such restrictions and conditions were imposed by Movants upon any examinations by agents of the Government of any of said books, records, files and correspondence, and that the agents of the Government made their examination of said books, records, files and correspondence under such restrictions and conditions.

IT IS, THEREFORE, THE ORDER AND JUDGMENT OF THE COURT, that said restrictions and conditions be respected and enforced, and that any information obtained by the Government Agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation.

Dated at Dallas, Texas, this the 5th day of August, 1957.

WM. H. ATWELL.
United States District Judge

APPROVED AS TO FORM:

M. W. McMAHON
DAN MOODY

Attorneys for Movants

Attorneys for the
United States Government

NOTICE OF APPEAL

Filed August 30, 1957.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

MISCELLANEOUS MATTER NO. 2 AND 3
IN THE MATTER OF SUBPOENAS
DUCES TECUM
COMMANDING THAT
ANDREW B. SHELTON AS SECRETARY OF
AND THE FOLLOWING CORPORATIONS
HARTE-HANKS NEWSPAPERS, Abilene, Texas
BANNER PUBLISHING COMPANY, Greenville,
Texas
MARSHALL PUBLISHING COMPANY, Marshall,
Texas
DENISON HERALD, Inc., Denison, Texas
APPEAR AND PRODUCE CERTAIN
DOCUMENTS BEFORE THE GRAND JURY
FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION

NOTICE OF APPEAL

Notice is hereby given that the United States of America, respondent in the above proceeding, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order prohibiting the use before the grand jury in any criminal investigation of any information obtained by Government agents through the examination of certain books, records, files and correspondence of the corporations and individuals above named, entered in this action on August 5, 1957.

/s/ HENRY M. STUCKEY
HENRY M. STUCKEY

/s/ PAUL A. OWENS
PAUL A. OWENS

Attorneys for Appellant
United States of America
Address: Department of Justice
Washington 25, D.C.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Filed September 18, 1957.

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, appellant United States of America

hereby designates the entire record of the proceedings in the district court as the record on appeal, consisting of the following:

1. Motion of Harte-Hanks Newspapers, et al., to suppress subpoenas.

2. Motion of Denison Herald, Inc. to suppress subpoena.

3. Transcript of proceedings before the district court, held on August 3 and August 5, 1957.

4. Government's proposed order.

5. Order of the court, dated August 5, 1957, prohibiting the use before the grand jury in any criminal investigation of certain information previously obtained by Government agents.

6. Notice of appeal.

7. This designation.

/s/ DANIEL M. FRIEDMAN
DANIEL M. FRIEDMAN

Attorney for Appellant
United States of America
Address: Department of Justice
Washington 25, D.C.

CERTIFICATE OF SERVICE

I, Daniel M. Friedman, certify that I have this date served copies of the attached Designation of Contents of Record on Appeal by air mail upon Dan Moody, Esquire, Capitol National Bank Building, Austin, Texas and McMahon, Smart, Walter, Sprain & Wilson, P. O. Box 1440, Abilene, Texas, counsel for appellees.

/s/ DANIEL M. FRIEDMAN
DANIEL M. FRIEDMAN

September 17, 1957

CLERK'S CERTIFICATE.

I, JOHN A. LOWTHER, Clerk of the United States District Court in and for the Northern District of Texas, do hereby certify that the above and foregoing is a true and correct copy and transcript of record of all papers called for in the designation, together with pertinent papers, which are a part of this transcript, in Miscellaneous Matters Nos. 2 and 3, on the docket of aforesaid court, wherein United States of America is appellant, and Harte-Hanks Newspapers, Abilene, Texas, et al, are appellees, as fully as the same remain on file and of record in my office at Fort Worth, Texas.

Given under my hand and seal of office at Fort Worth, Texas, this 4th day of October, 1957.

(SEAL)

JOHN A. LOWTHER, Clerk.
By /s/ RUTH BUCKLEY,
Deputy.

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:-

ARGUMENT AND SUBMISSION.

Extract from the Minutes of February 5, 1958.

UNITED STATES OF AMERICA,

No. 16927. versus

HARTE-HANKS NEWSPAPERS, ABILENE, TEXAS, ET AL.,

On this day this cause was called, and after argument by Daniel M. Friedman, Esq., Attorney, Department of Justice, for appellant and Dan Moody, Esq., for appellees, was submitted to the Court.

--ooOoo--

OPINION OF THE COURT FILED:-

April 24, 1958

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16927

UNITED STATES OF AMERICA,

Appellant,

versus

HARTE-HANKS NEWSPAPERS, ABILENE, TEXAS, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(April 24, 1958.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal presents the validity *vel non* of an order of the court below, entered at the outset of a Grand Jury investigation, denying the Government the right to use before the Grand Jury information obtained by its agents in their examination of the books of the appellees, Harte-Hanks Newspapers,

Banner Publishing Company, Marshall Publishing Company, and Denison Herald, Inc. The court entered the order granting appellees' motions upon its finding that, prior to the issuance of the subpoenas duces tecum which the records were required to be produced before the Grand Jury, appellees had submitted to the Government for examination their books, records and files upon their understanding that they would not be used in connection with any criminal investigation or prosecution.

The trial court heard the testimony of three witnesses, Bruce Meador, a representative of the four corporations, T. J. McMahon, their attorney, and Ural E. Horton, Jr., Special Agent of the Bureau of Investigation, Department of Justice. The testimony was in sharp conflict. Meador and McMahon testified that, when the government agent requested the right to examine the books, records and files of the four newspapers, he was informed that these records would be submitted to him on condition that they be not used in connection with any criminal investigation or prosecution, and he was requested to note this condition in his report to the Government.

Horton testified that no such condition was expressed or discussed, that he advised Meador and McMahon that they had a right to refuse to produce the records if they desired, and advised them further that the records could be used against them by the Government, stating further that he did not know the purpose of the investigation then in progress. He testified that he had no authority to promise any person that he would be

"free from any prosecution" concerning any statements made or records furnished. He introduced a long letter addressed to him by Meador which listed the documents furnished and gave certain requested information. This letter, which accompanied Meador's delivery of the corporate records to Horton, made no mention of the condition testified by Meador and McMahon as having been imposed upon the surrender of the records to the Government. The letter also offered to furnish further information if requested to do so. The court resolved the conflicts between the witnesses in favor of appellees.[1]

We are not able to say that these findings of fact are clearly erroneous and we accept them as the predicate upon which our decision will rest. We recognize, however, as do the appellees, that there was no express agreement between the Government and appellees, and that the "understanding" grew out of the conditional furnishing of the records and was an understanding held by appellees alone, it being "quite immaterial," in the court's mind, whether "it was agreed to by the Government."

1 "After having heard the testimony, however, and using the Chancellor's power to pass upon the credibility of the witnesses who have testified, I am of the opinion and find that the Defendants, who and which were being exposed for the divulgence of testimony which could be used before the Grand Jury in a criminal investigation; that such admonition and pledge was exacted by the attorney for these respective publications, and that that understanding, whether it was agreed to by the Government or not is quite immaterial, was to the effect that such information, as, is and was furnished, should not be used in any criminal investigation or by the Grand Jury for such purpose. . . .

". . . This is a country of great liberty, gentlemen, and we must all stand for it. This information must not be used before the Grand Jury for criminal investigation."

The court found further that the records covered by the subpoenas were to be used in connection with a projected criminal prosecution.

The motions set forth the condition upon which the corporate records had been turned over to the Government,[2] and prayed solely that "the subpoenas be suppressed and . . . said condition fully respected." The motions did not allege that any of appellees' constitutional rights had been violated, but the court, in its memorandum opinion, held that "constitutional provisions" would be violated if use of the records before the Grand Jury should be permitted.[3] The order of the court did not quash or suppress the subpoenas, but commanded only that the restriction placed upon the use of the records by appellees be respected.[4]

What we have before us, therefore, is an order entered by the District Court at the beginning of a Grand

[2] "The request was made of one of the attorneys for one or more of the above named parties. Said attorney agreed to submit such letters, papers and records for examination by said representative upon the condition that none of them would be used in any manner in the prosecution of any action against any person or company or corporation named or referred to therein. Said papers were submitted to said representative of the Government upon the terms above stated. . . . The use of any of said papers in any attempted prosecution would be in violation of the conditions; and the Court should suppress the subpoenas and order that the above stated condition should be respected.

[3] "It seems quite unnecessary to cite authorities, because one of the fundamentals of a free government denies the right of the servants of the people to secure evidence, or testimony, in the manner indicated for use against the citizen. It would violate not only constitutional provisions, but the very thought of liberty and freedom itself."

[4] "It is, therefore, the order and judgment of the Court, *that said restrictions and conditions be respected and enforced,* and that any information obtained by the Government Agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation." [Emphasis added.]

Jury investigation which prohibited in advance the use before the Grand Jury of the information obtained by the government agent from appellees' records. In our opinion the order was without legal justification. Its language showed clearly that the denial of use of the records and information before the Grand Jury was predicated solely upon its declaration that the restrictions and conditions should be respected and enforced. These restrictions were unilateral only. Appellees knew that Horton was not advised of the purpose of the investigation and that, as a mere field agent, he had no authority to agree to any restrictions. The most appellees contend is that they requested that he advise the Government of the restrictions when he made his report.[6] Appellees did not follow up their request or withhold the records until they learned whether it would be respected--even if it be assumed that some agent of the Government had the authority to enter into such an agreement. Cf. *United States v. Ford, et al* (Whiskey Cases), 1878, 99 U.S. 594.

Appellees pitch their argument entirely upon the contention, not raised in their motions, that the evidence

[6] Here is the way appellees deal with this question in their brief: "Appellees' attorney told Mr. Horton . . . that he 'wanted to know whether or not the information that he was seeking was to be used by him in furtherance of any criminal prosecution.' The agent stated that he did not know. Appellees' attorney then stated that he wanted the examination 'to be definitely on condition that what he learned or what he copied or the information that he got from the files, . . . were not to be used by him in furtherance of any criminal prosecution.' The agent said that he did not know whether '. . . . 'would be used in that manner or not;' and appellees' attorney then stated that he was sure the agent would file a report, and that he 'would appreciate it very much if you would incorporate in the report the substance of this conversation and the condition that I have attached to your going into these files.'"

ought to be withheld from the Grand Jury on the ground that it was illegally obtained in violation of appellees' rights under the Fourth and Fifth Amendments to the Constitution.

The Fifth Amendment, of course, does not apply to corporations,[6] and it is perfectly clear that the records were not obtained by any illegal search or seizure in contravention of the Fourth Amendment.[7] Horton entered the premises of appellees with the consent of Meador after having 'phoned for an engagement. Even under appellees' evidence, he made no threats or misrepresentations, employed no strategems, practiced no concealment, coercion or fraud. He did not seize any records at all. They were delivered to him voluntarily by Meador two weeks after the request was made. Appellees and their attorney knew all the while that they had no assurance from the Government that any condition which might have been imposed would be honored. We find nothing in appellees' argument or in their authorities to justify the ruling of the court below.

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[6] Genecov v. Fed. Pet. Bd., 5 Cir., 1944, 146 F.2d 596, 597, cert. den. 324 U.S. 865; United States v. Bausch & Lomb Co., 321 U.S. 707, 726.

[7] Appellees cite in support of their Fourth Amendment contentions United States v. Wallace et al, 1949 336 U.S. 793; Silverthorn Lumber Co. v. United States, 1920, 251 U.S. 385; Weeks v. United States, 1914, 232 U.S. 383; McDonald v. United States, 1948, 335 U.S. 451; Go-Bart Importing Co. v. United States, 1931, 282 U.S. 344; and Judd v. United States, D.C. Cir., 1951, 190 F.2d 649. Every one of the cases involved an actual forcible search of the premises of a litigant without warrant, and no case cited bears any resemblance on its facts or announces any principle which would support the action of the court below.

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It is established law that suppression of evidence prior to an indictment should be considered only when there is a clear and definite showing that constitutional rights have been violated. Cf. *United States v. Wallace, supra*, 366 U.S. 793, 796. And under our holding in *Eastus v. Bradshaw*, 1938, 94 F.2d 788, the validity of his entire proceeding is subject to serious doubt. In *White v. United States*, 1952, 194 F.2d 215, 217, cert. den. 343 U.S. 930, we held that one proceeding, as are appellees here, under Rule 41(e), Federal Rules of Criminal Procedure, could not hold the Internal Revenue Bureau, as a matter of contract, to its declared policy of granting immunity to persons making voluntary disclosure.

The office of the Grand Jury under our system is an important one, and its ability to function should not be limited by questions of propriety, *Blair et al v. United States*, 1919, 250 U.S. 273, 282, it being vital that it possess the power to conduct broad investigations[8] fettered only by the requirement that constitutional rights be not infringed.[9]

The order of the District Court granting the motions is reversed and the cause is remanded for the entry of an order denying them.

REVERSED AND REMANDED.

[8] The Supreme Court, in Costello v. United States, 1956, 350 U.S. 359, 362, indicated that the inquisitorial powers of the Grand Jury, as was true of its English progenitor, should be so broad as to be free "from control by the Crown or judges."

[9] By the provisions of 15 U.S.C.A. §32 and §33 immunity is granted to any natural person testifying or producing records before a grand jury investigating possible violation of the anti-trust laws.

JUDGMENT.

Extract from the Minutes of April 24, 1958.

UNITED STATES OF AMERICA,

No. 16927. versus

HARTE-HANKS NEWSPAPERS, ABILENE, TEXAS, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for the entry of an order in accordance with the opinion of this Court.

—oo0oo—

APPELLEES' NOTICE OF MOTION TO STAY MANDATE AND MOTION FOR ORDER STAYING ISSUANCE OF MANDATE FILED:-

May 14, 1958.

United States Court of Appeals

FIFTH CIRCUIT

No. 16927

UNITED STATES OF AMERICA,
Appellant,

versus

HARTE-HANKS NEWSPAPERS,
a corporation, ET AL,
Appellees.

NOTICE OF MOTION TO STAY MANDATE

TO: Honorable Victor R. Hansen
Assistant Attorney General

Honorable Daniel M. Friedman
Honorable Ernest L. Folk III
Honorable Henry M. Stuckey
Honorable Paul A. Owens
Attorneys, Department of Justice
Washington, D. C.

Honorable Heard L. Floore
United States Attorney
Northern District of Texas
Fort Worth, Texas

YOU WILL PLEASE TAKE NOTICE that, pursuant to the rules of the Court, appellees will move

APPELLEES' BOND FOR STAY OF MANDATE FILED: -

May 14, 1958.

UNITED STATES COURT OF APPEALS

Fifth Circuit

No 16927

U. S. COURT OF APPEALS
FILED
MAY 14 1958
EDWARD W. WADSWORTH
CLERK

UNITED STATES OF AMERICA, Appellant

VERSUS

HARTE-HANKS NEWSPAPERS, a corporation, ET AL, Appellees

APPEAL BOND

WHEREAS, in the above entitled and numbered cause pending in the United States Court of Appeals, Fifth Circuit, at New Orleans, and at a regular term of said court, to-wit, on the twenty-fourth day of April, 1958, said court reversed the judgment of the District Court and entered judgment for appellant United States of America and against appellees Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company, Greenville, Texas, Marshall Publishing Company, Marshall, Texas, Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas and Denison Herald, Inc., Denison, Texas, and granting appellant United States of America the relief sought and prayed for, and from which judgment appellees Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company, Greenville, Texas, Marshall Publishing Company, Marshall, Texas, Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas, and Denison Herald, Inc., Denison, Texas, desire to apply for a writ of certiorari to the Supreme Court of the United States in said cause; and that all matters pending in the District Court and in the United States Court of Appeals be stayed pending hearing on the application for writ of certiorari and the action thereon;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that we, Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company,

the District Court and entered judgment for appellant United States of America and against appellees Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company, Greenville, Texas, Marshall Publishing Company, Marshall, Texas, Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas and Denison Herald, Inc., Denison, Texas, and granting appellant United States of America the relief sought and prayed for, and from which judgment appellees Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company, Greenville, Texas, Marshall Publishing Company, Marshall, Texas, Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas, and Denison Herald, Inc., Denison, Texas, desire to apply for a writ of certiorari to the Supreme Court of the United States in said cause; and that all matters pending in the District Court and in the United States Court of Appeals be stayed pending hearing on the application for writ of certiorari and the action thereon;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that we, Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company,

Greenville, Texas, Marshall Publishing Company, Marshall, Texas, Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas, and Denison Herald, Inc., Denison, Texas, as principals, and National Surety Corporation, New York, New York, as surety, acknowledge themselves, and each of them, bound to pay to the United States of America the sum of two thousand five hundred dollars ($2,500.00), conditioned that the said Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company, Greenville, Texas, Marshall Publishing Company, Marshall, Texas, Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas, and Denison Herald, Inc., Denison, Texas, appellees, shall prosecute their certiorari proceeding to effect and shall pay all costs which have accrued in the District Court, in the United States Court of Appeals, Fifth Circuit, and which may accrue in the Supreme Court of the United States.

WITNESS OUR HANDS this the twelfth day of May, 1958.

HART-HANKS NEWSPAPERS
Abilene, Texas
BANNER PUBLISHING COMPANY
Greenville, Texas
MARSHALL PUBLISHING COMPANY
Marshall, Texas
MATT SHELEY, Publisher,
THE GREENVILLE HERALD-BANNER,
Greenville, Texas,

their certiorari proceeding to effect and shall pay all costs which have accrued in the District Court, in the United States Court of Appeals, Fifth Circuit, and which may accrue in the Supreme Court of the United States.

WITNESS OUR HANDS this the twelfth day of May, 1958.

HART-HANKS NEWSPAPERS
Abilene, Texas
BANNER PUBLISHING COMPANY
Greenville, Texas
MARSHALL PUBLISHING COMPANY
Marshall, Texas
MATT SHELEY, Publisher,
THE GREENVILLE HERALD-BANNER,
Greenville, Texas,
DENISON HERALD, INC.
Denison, Texas

Principals

By John Mooty
Attorney

(SEAL)

NATIONAL SURETY CORPORATION
New York, New York

Surety

By

J.O.Garrett, Attorney-in-fact

the Court for the entry of an order in the above captioned case, staying the issuance of the mandate until the Supreme Court of the United States acts on an application for writ of certiorari that is to be filed with the Clerk of the Supreme Court of the United States. A copy of such motion is attached hereto.

DATED: May 12, 1958.

McMAHON, SMART, SPRAIN & WILSON
Abilene, Texas

T. J. McMAHON
Post Office Box 1440
Abilene, Texas

/s/ DAN MOODY
DAN MOODY
Capital National Building
Austin, Texas

Attorneys for Appellees

United States Court of Appeals

FIFTH CIRCUIT

No. 16927

UNITED STATES OF AMERICA,
Appellant,
versus

HARTE-HANKS NEWSPAPERS,
a corporation, ET AL,
Appellees.

MOTION FOR ORDER STAYING ISSUANCE OF MANDATE

MAY IT PLEASE THE COURT:

Now come Harte-Hanks Newspapers, a corporation, Banner Publishing Company, Greenville, Texas, Marshall Publishing Company, Marshall, Texas, Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas, and Denison Herald, Inc., Denison, Texas, appellees, and, because it is the bona fide intention of the above named appellees to make proper and timely application to the Supreme Court of the United States for writ of certiorari,

move this Court for an order in the above captioned case, pursuant to Rule 32 of this Court, staying the issuance of the mandate and the execution of the judgment under the provisions of Section 2101, Title 28, United States Code Annotated, until the Supreme Court of the United States has finally determined the case on the application for writ of certiorari that is to be filed in the Supreme Court of the United States.

I.

This Court decided this case on April 24, 1958. No petition for rehearing has been filed and no petition for rehearing will be filed. Petition for writ of certiorari will be filed.

II.

Appellees, above named, respectfully move this Honorable Court to stay the mandate in the above entitled action for a period of ninety (90) days, pending application for certiorari from the Supreme Court of the United States, and not permit the mandate to be issued out of said cause until the further order of the Court, on the ground and for the reason that appellees expect and intend, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari of the decision and judgment rendered in favor of appellant and against appellees in the above entitled action, and:

The application for certiorari will be made on the basis of the importance of the attorney for appellees having told the Government agent that, if the papers or documents which he wished to obtain were to be used in connection with a criminal prosecution, the appellees did not intend to give to the agents any information. (R. 31-32, 46-47, 51-52, 70-71) The question raised by this case is of wide public importance and national interest. The importance of the question gives jurisdiction to the Supreme Court of the United States to grant writ of certiorari. The questions of law raised in this case should be decided by the Supreme Court of the United States, and:

Appellees tender herewith a good and sufficient bond in the sum of two thousand five hundred dollars ($2,500.00) with National Surety Corporation, New York, New York, as surety thereon, conditioned that if appellees fail to make application for writ of certiorari within the period allowed therefor, or fail to obtain an order granting their application, or fail to make their plea good in the Supreme Court, they shall answer for damages and costs which appellant herein may sustain by reason of the stay; and if the amount of said bond is insufficient, then appellees will file an additional bond, and:

Appellees further show that if the above bond is not adequate, then appellees ask the Court to fix the amount of any additional bond required of appellees.

WHEREFORE, appellees pray that the Court make and enter an appropriate order herein staying the issuance of the mandate in the above entitled and numbered action until further order of

this Court, and that they be given a reasonable time in which to execute and file any additional bond, if such be required; and that proceedings in the cause be stayed pending the filing by appellees of a petition for writ of certiorari.

McMAHON, SMART, SPRAIN & WILSON
Abilene, Texas
T. J. McMAHON
Post Office Box 1440
Abilene, Texas

/S/ DAN MOODY
DAN MOODY
Capital National Building
Austin, Texas

Attorneys for Appellees

THE STATE OF TEXAS
COUNTY OF TRAVIS

Dan Moody, upon oath, says:

That he is one of the attorneys of record for appellees in the above entitled action: that he served a copy of the above and foregoing motion upon appellants by mailing to Honorable Victor R. Hansen, Assistant Attorney General, Honorable Daniel M. Friedman, Honorable Ernest L. Folk III, Honorable Henry M. Stuckey, Honorable Paul A. Owens, Attorneys, Department of Justice, Washington, D. C., and Honorable Heard L. Floore, United States Attorney, Northern District of Texas, Fort Worth, Texas, counsel for appellant. United States of America; said copies being mailed by regular United States mail with the postage duly paid thereon, the same having been deposited in the post office at Austin, Texas, on May 12th, 1958.

/S/ DAN MOODY
Dan Moody

Subscribed and sworn to before me this the 12th day of May, 1958.

/S/ SUSETTE MEYER
(SEAL)
Notary Public in and for
Travis County, Texas

ORDER STAYING MANDATE FILED:-

May 14, 1958

United States Court of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

versus

MARIE-HANKS NEWSPAPERS, ATLANTA, TEXAS, ET AL.,
Appellee.

No. 16927

ON CONSIDERATION OF THE APPLICATION of the Appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable them to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 14th day of May, 1958.

/s/ ELBERT P. TUTTLE
United States Circuit Judge.

CLERK'S CERTIFICATE
UNITED STATES OF AMERICA.
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

I, EDWARD W. WADSWORTH, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 83 to 100, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 16927, wherein United States of America, is appellant and Harte-Hanks Newspapers, Abilene, Texas, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 82 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit this 14th day of May, A. D , 1958.

Edward W. Wadsworth
Clerk, United States Court of Appeals for the Fifth Circuit.

--ooOoo--

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JUN 6 1958
JOHN T. FEY, Clerk

No. 1053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

HARTE-HANKS NEWSPAPERS,
ABILENE, TEXAS, ET AL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

McMAHON, SMART, SPRAIN & WILSON
Abilene, Texas

T. J. McMAHON
Post Office Box 1440
Abilene, Texas

DAN MOODY
1203 Capital National Building
Austin, Texas

Attorneys for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

HARTE-HANKS NEWSPAPERS,
ABILENE, TEXAS, ET AL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company, Marshall Publishing Company, Matt Sheley, Publisher, The Greenville Herald-Banner and Denison Herald, Inc., respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review

the decisions of the United States Court of Appeals for the Fifth Circuit, rendered on April 24, 1958, which reversed the judgment of the United States District Court for the Northern District of Texas, and remanded the cause for the entry of an order denying petitioners' motion.

Opinion Below

In the United States District Court for the Northern District of Texas, Fort Worth Division, sitting in the Dallas Division of said District, Judge Atwell heard petitioners' motion to suppress certain subpoenas directed to Harte-Hanks Newspapers, to Banner Publishing Company, to Marshall Publishing Company, to Matt Sheley, Publisher, to The Greenville Herald-Banner and to Denison Herald, Inc (R. 3-7, 8-28) Judge Atwell suppressed the subpoenas. (R. 29-30, 76-77)

United States appealed to the United States Court of Appeals for the Fifth Circuit; and that Court reversed the order made by Judge Atwell. (R. 84-89)

On appeal to the United States Court of Appeals for the Fifth Circuit, the decree was:

> * * * "the order of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court". * * * (R.91)

From this order petitioners are appealing. Appendix A.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). See also Rules 37(b) (2) and 45(a) F. R. Crim. Pro. Title 18, Section 3231, U. S. C. confers jurisdiction.

Date of Judgment

Judgment was handed down and entered April 24, 1958. (R. 84, 91) Appendix B.

Motion to Stay Mandate

Motion to stay issuance of the mandate and for extension of time under 28 U. S. C. Sec. 2101, pending the filing of application for writ of certiorari from the Supreme Court, was granted and the time was extended for thirty days, that is, thirty days from May 14, 1958. (R. 98)

Questions Presented

I.

When it is proved by two witnesses that "the Government agent requested the right to examine the books, records and files of the four newspapers, (and) he was informed that these records would be submitted to him on condition that they be not used in connection with any criminal investigation or prosecution, and he was requested to note this condition in his report to the Government", does the testimony of one negative witness investigating the facts overcome the testimony of the two witnesses,

especially when the trial court heard the testimony of the two witnesses as against the testimony of the Government agent, and found favorably to petitioners? (R. 85)

II.

The Court of Appeals allowed the issue to turn on the following uncertainty:

> "We are not able to say that these findings of fact are clearly erroneous and we accept them as the predicate upon which our decision will rest." (R. 86)

Can such uncertainty be accepted to turn the course of justice? (R. 90)

Invalid subpoenas were left with petitioners. (R. 8-22)

Constitutional Amendment and Statutes Involved

The Fourth Amendment to the Constitution of the United States.

Rule 41(e) of the Federal Rules of Criminal Procedure, Motion for Return of Property and to Suppress Evidence, as for example, "for use as evidence anything so obtained on the ground that * * * (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued".

Specification of Errors

The Court of Appeals erred in refusing to hold that the evidence should have been withheld from

the grand jury on the ground that it was illegally obtained in violation of petitioners' rights under the Fourth Amendment to the Constitution of the United States.

Reasons for Granting the Writ

The court below has decided important questions of federal law which have not been, but which should be, settled by this Court.

Argument

Petitioners pray that a writ of certiorari issue in this cause to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing the judgment of the United States District Court for the Northern District of Texas and rendering judgment for the United States of America.

The Government appealed from orders of the District Judge. (R. 31-32, 76-77) The findings of the District Judge were:

> * * * "that the material that was taken from the complainants was furnished to the government's representative after a conference with the attorneys for the newspapers wherein it was agreed that the goverment's representative might retain the matter, provided the same was not used in a criminal prosecution, or, in an attempt to secure a criminal indictment." (R. 31-32)

The Judge made the further finding:

> * * * "that the papers that were secured by the subpoenas were secured, as I have

> just said, by an agreement with the complainants' attorneys and that the papers should not be used before the grand jury in a criminal case." (R. 32)

The final order of the United States District Judge was entered on August 5, 1957. (R. 76-77) Therein the Court stated:

> * * * "having read the pleadings and heard the evidence and argument of Counsel is of the opinion and finds that such restrictions and conditions were imposed by Movants upon any examinations by agents of the Government of any of said books, records, files and correspondence, and that the agents of the Government made their examination of said books, records, files and correspondence under such restrictions and conditions.
>
> "IT IS, THEREFORE, THE ORDER AND JUDGMENT OF THIS COURT, that said restrictions and conditions be respected and enforced, and that any information obtained by the Government agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation." (R. 77)

Heretofore there was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Harte-Hanks Newspapers, Abilene, Texas, and commanding said Harte-Hanks Newspapers to appear in the United States District

Court for said District at the United States courthouse in the City of Dallas, Texas, "on the 5th day of August, 1957, to testify before the grand jury and bring certain documents described in a paper called an 'ANNEX' attached to said subpoena". June 14, 1957, a copy of an unsigned, undated subpoena, without seal, was left with a representative of Harte-Hanks Newspapers. (R. 8-12)

There was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Banner Publishing Company, and commanding said Banner Publishing Company to appear in the United States District Court for said District at the United States courthouse in the City of Dallas, Texas, "on the 5th day of August, 1957, to testify before the grand jury and bring certain documents described in a paper called an 'ANNEX' and attached to said subpoena". On July 6, 1957, a copy of an unsigned, undated subpoena, without seal, was left with a representative of Banner Publishing Company. (R. 12-17)

There was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service on Marshall Publishing Company, commanding said company to appear in the United States District Court for the Northern District of Texas at the United States courthouse in the City of Dallas on August 5, 1957, to testify before the grand jury "and bring certain documents described in a paper called an 'ANNEX' attached to said subpoena"; said subpoena was served on July 22, 1957. A copy of an

unsigned subpoena dated July 17, 1957, without seal, was left with a representative of Marshall Publishing Company. (R. 18-20)

There was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas, commanding Sheley to appear in the United States District Court in the City of Dallas on August 7, 1957, to testify before the grand jury; subpoena was served on July 20, 1957. A copy of an unsigned subpoena dated July 12, 1957, without seal, was handed to said Sheley. (R. 21-22)

Petitioners contend that the attempted service described above did not conform to the requirements of the rules, and that said subpoenas should be suppressed.

Prior to the time that any of the above process was issued a representative of the United States Government asked the privilege of examining certain letters, papers and records that passed between the corporations and corporate officers. The request was made of one of the attorneys for one or more of the above named parties. The attorney agreed to submit such letters, papers and records for examination by said representative, conditioned that none of them would be used in any manner in the prosecution of any action against any person, or company, or corporation, named or referred to therein. The papers were submitted to said representative of the Government upon the terms above stated.

The process now issued calls for production before the grand jury of papers which were so submitted to the Government representative under the terms above stated. The use of any such papers in any attempted prosecution would be a violation of the conditions upon which they were submitted, and the Court should suppress the subpoenas and order the above stated conditions respected.

In *Harte-Hanks Newspapers, etc., versus United States Officers and Jury*, 154 Fed. Supp. 68, United States District Judge Atwell ruled that petitioners were entitled to an order denying to the Government the right to use the documents herein described before the grand jury.

The trial court, presided over by a district judge of wide experience, heard the testimony of the witnesses and made the finding "that such restrictions and conditions (that information obtained by examination of petitioners' papers would not be used in connection with any criminal prosecution) were imposed by Movants (petitioners) upon any examination by agents of the Government of any of said books, records, files and correspondence, and that the agents of the Government made their examination of said books, records, files and correspondence under such restrictions and conditions." The order followed "that said restrictions and conditions be respected and enforced, and that any information obtained by the Government Agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation." (R. 77)

It was under the conditions and limitations which the trial court so imposed that the Government agents were to examine the books, records, files and correspondence, or they were not to be examined by the agents of the Government.

The trial judge had found that the papers, books, records, files, reports and correspondence were the property of the petitioners, and evidently he had reached the conclusion that there was not any sufficient reason shown or stated that would form a legal basis for the Government reaching by subpoena such records, papers, books, etc.

There was not any allegation that the papers, books, records, files, reports and correspondence listed in the annex to any subpoena would show a law violation subject to prosecution in a District Court of the United States.

After hearing the cause the court found that the papers secured by subpoenas were secured "by an agreement with the complainants' attorneys and that the papers should not be used before the grand jury in a criminal case". (R. 31-32)

In the order, the court referred to the motions for orders suppressing the subpoenas duces tecum, "and for enforcement of the conditions imposed preliminary to any examination or inspection by agents of the Government of the books, records and files of the movants, under which condition representatives of the Government preliminary to any subpoena being served did in fact examine, inspect and copy books, records, files and correspondence which were in possession of movants under the above stated condition imposed by movants." (R. 76)

Harte-Hanks Newspapers rely upon Rule 17(d) *Federal Rules of Criminal Procedure.* The attempted service did not conform to the requirements of the rules and the subpoenas should be suppressed.

Prior to any process having been issued, a representative of the Government requested to examine certain papers, records, etc., which had passed between the "above named corporations and corporate officers". Attorneys for petitioners agreed to submit papers for examination upon condition that none would be used in any manner in the prosecution of any person, company or corporation named therein. The papers were submitted on those terms to the examination of the Government agent or employee. The process last issued calls for production before the grand jury of some, if not all, of the papers submitted to the Government agent. The use of the papers in an attempted prosecution would be a violation of the condition imposed upon the consent that respondent examine the papers; and the Court should suppress the subpoenas and order that the above stated conditions should be respected. (R. 3-7)

Unsigned, undated purported copies of subpoenas commanding appearance before the grand jury were left with Harte-Hanks Newspapers, Banner Publishing Company, Marshall Publishing Company and Matt Sheley, Publisher, The Greenville Herald-Banner. In the unsigned copies of subpoenas served by the Government, excepting the one to Matt Sheley, demand was made for matters listed by respondent under the word "Annex". In the list under

the Banner Publishing Company there is attached a list of desired papers, including articles of incorporation, by-laws, profit and loss statements, lists of stockholders owning 10% or more of the voting capital stock, all correspondence, memoranda or other communications passing between the corporation, its officers, directors or employees, and (1) Harte-Hanks, its partners, employees or agents, (2) Banner Publishing Company, its officers, employees or agents, (3) any newspaper in the Harte-Hanks chain, its officers, employees or agents and (4) any other concern and any other person, relating to the following: Greenville Morning Herald and Greenville Evening Banner. (R. 8-11)

The request directed to Banner Publishing Company and the request directed to Marshall Publishing Company did not descend into as much detail as was requested in Exhibit C. (R. 18-20)

"Preliminary to any subpoena being served Government agents did in fact examine, inspect and copy books, records, files and correspondence which were in possession of movants (Petitioners here) under stated conditions imposed by movants." (R. 76) The court found that such restrictions and conditions were imposed by movants (Petitioners here) upon any examination by agents of the Government of said books, records, files and correspondence, and that the agents of the Government made their examination of said books, records, files and correspondence under such restrictions and conditions. (R. 76-77)

The court ordered:

> * * * "that said restrictions and conditions be respected and enforced, and that any information obtained by the Government agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation." (R. 77)

The trial judge having heard the testimony stated:

> "After having heard the testimony, however, and using the Chancellor's power to pass upon the credibility of the witnesses who have testified, I am of the opinion and find that the defendants, who and which were being exposed for the divulgence of testimony which could be used before the Grand Jury in a criminal investigation, that such admonition and pledge was exacted by the attorney for these respective publications, and that that understanding, whether it was agreed to by the Government or not is quite immaterial, was to the effect that such information, as, is and was furnished, should not be used in any criminal investigation or by the Grand Jury for such purpose. I think the testimony further demands that the court recognize from this testimony here that the purpose of this was for criminal indictments to be sought and found by the Grand Jury, which was then in session at Dallas, Texas.
>
> * * * "This information must not be used before the Grand Jury for criminal investigation." (R. 70-71)

> "The Court having read the pleadings and heard the evidence and argument of Counsel is of the opinion and finds that such restrictions and conditions were imposed by Movants (Petitioners here) upon any examination by agents of the Government of any of said books, records, files and correspondence, and that the agents of the Government made their examination of said books, records, files and correspondence under such restrictions and conditions." (R. 77)

The basic question presented is whether petitioners were fairly and legally treated in respect to petitioners' association with Mr. Horton, a government agent. Apparently Mr. Horton was interested in balance sheets, balance statements and operating statements for the years June 30, 1951 to June 30, 1953 of Banner Publishing Company, The Synder Daily News, Big Spring Herald, Denison Herald, Paris News, Marshall News, Greenville Banner, Abilene Reporter-News, San Angelo Standard Times and Corpus Christi Times, and the lineage run for each of these papers for the same period. Mr. Meador was of the opinion that the above list covered the items asked for by Mr. Horton. Mr. Meador told Mr. Horton that he would go and talk with Mr. McMahon, attorney for the newspapers and a practicing attorney in Abilene, Texas, in respect to the request made by Mr. Horton. Mr. McMahon told Mr. Horton that:

> "We wish to cooperate with you; but I want to place you on notice that if it is to be used in connection with criminal prose-

> cution, we do not intend to give you any information." (R. 46)

Mr. Horton stated that he did not

> "know the purpose it was to be used for; he was requested to get that information, and Mr. McMahon said that he wanted him 'to place a note in your report that we called this to your attention, and we are giving you that information on this condition.'" (R. 46)

Mr. Horton was then asked:

> "What was the condition that you speak of?"

The reply was: "That it was not to be used in connection with criminal prosecution." (R. 47)

Mr. McMahon, attorney for petitioners, had been consulted concerning the matter under investigation. Mr. Horton accompanied Mr. Meador to Mr. McMahon's office. Mr. Horton exhibited his FBI credentials; he told Mr. McMahon that he "was commissioned by his superiors to make some examinations and get some information from the files of the paper". Mr. Horton was asked the purpose of the examination. "He stated that he did not know; that he is merely a field agent; that he had the order to get this information and was there to do his job." (R. 51-52)

Mr. McMahon questioned Mr. Horton whether the desired information was to be used in furtherance of any criminal prosecution. Mr. Horton stat-

ed that he did not know. He did not exhibit any letter relating to an anti-trust investigation. Mr. McMahon stated that he wanted to cooperate with any legitimate aims of the Government; but that he wanted his examination to be definitely on the condition that what he learned or what he copied or the information that he got from the files was not to be used by him in furtherance of any criminal prosecution.

Mr. Horton stated that he did not know whether what he learned would or would not be used in that manner.

Mr. McMahon told Mr. Horton that if he filed a report he (McMahon) would appreciate Horton's incorporating in the report the substance of their conversation and the condition imposed upon Mr. Horton's going into the files of the newspapers.

Mr. Owens asked the question: "Did you undertake to place this condition in writing that you have just testified to?" Mr. McMahon's reply was:

> "I undertook to get it placed in writing in a sense that the gentleman would incorporate it in his report so that not only the examination that he was then conducting, but all future requests, would be governed by the condition that he was supposed to put in that report. He told me he would put it in there." (R. 54)

Mr. Horton testified that he was a special agent of the Federal Bureau of Investigation and that he was located in Abilene. Mr. Horton told of his calling on Mr. Meador and presenting him with a letter from

the Assistant Attorney General of the United States. He told Mr. Meador that he did not have to furnish him with any information; that any he did furnish could be used in court. Apparently the principal subject was the organizational set up of the newspapers and of the organization.

Mr. Meador and Mr. McMahon conferred; and Mr. McMahon, as near as his recollection recalled, stated that he saw no reason why these records should not be made available inasmuch as the points of information supplied him were matters of public record. (R. 58)

A subpoena was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, to be served upon Harte-Hanks Newspapers, a corporation, demanding Harte-Hanks Newspapers to appear in the United States District Court, at the United States courthouse in Dallas, Texas, to testify before the grand jury and to bring certain papers. An unsigned, undated subpoena was left with Harte-Hanks Newspapers directing the production of documents described in a paper called an "Annex". (R. 2, 8) The unsigned subpoena called for the production of articles of incorporaton, profit and loss statements, correspondence and various other papers. (R. 9-12) Other subpoenas were issued to Banner Publishing Company, Greenville, Texas; to Marshall Publishing Company, Marshall, Texas, Matt Sheley, Publisher, and to The Greenville Herald-Banner, Greenville, Texas. (R. 12-20) A subpoena was also issued to Denison Herald, Inc., Denison, Texas. (R. 25-28) Apparently there was not any demand for the production of any papers,

records or other information in connection with the subpoena directed to Matt Sheley. (R. 21-22)

The material which the parties and witnesses were directed to produce related to articles of incorporation, by-laws, profit and loss statements, balance sheets, correspondence and other communications between the corporation, its officers, directors or employees and (1) Harte-Hanks, its partners, employees or agents, (2) Banner Publishing Company, its officers, employees or agents, (3) any newspaper in the Harte-Hanks chain, their officers employees or agents and (4) any other concerns and any other persons relating to (a) acquisition of Greenville Morning Herald by purchase, merger or otherwise; (b) competition between Greenville Morning Herald and Greenville Evening Banner; (c) relative strength of the Herald and the Banner and (d) means and methods, if any, to be used by Greenville Evening Banner in driving Greenville Morning Herald out of business. In general, except for the subpoena directed to Matt Sheley, each subpoena that was served called for the production of papers and facts substantionally as set forth in the above sentence of this paragraph. (R. 8-20, 25-28)

The service of subpoenas directed to Harte-Hanks Newspapers, Banner Publishing Company, Marshall Publishing Company, Matt Sheley and Denison Herald, Inc., was not valid service. None of the copies left with the parties purportedly served was a copy of a valid subpoena within the meaning of Rule 17 (d) Federal Rules of Criminal Procedure; in this, that the papers left with the parties as copies were not signed by the clerk or the deputy

clerk, and neither were the officers Returns or the Service Fees blanks completed on the purported subpoenas purportedly served.

Bruce Meador, an employee of Harte-Hanks Newspapers, testified as follows:

> "Mr. McMahon (attorney for Harte-Hanks Newspapers) told Mr. Horton (an agent of the Federal Bureau of Investigation) of a recent article in the Bar Association Journal concerning the inspection of records, and he told him that if this information was to be used in connection with criminal prosecution, he would not give him any information. He said that 'We wish to cooperate with you (the agent); but I want to place you on notice that if it is to be used in connection with criminal prosecution, we do not intend to give you any information' ". (R. 46)

The agent, Mr. Horton, said that he did not know the purpose for which the requested information was to be used. (R. 46) Mr. McMahon stated to the agent that he wanted him "to place a note in your report that we called this to your attention, and we are giving you that information on this condition." (R. 46) When the witness was asked "What was the condition that you speak of?", the witness answered "That it was not to be used in connection with criminal prosecution." (R. 47)

Mr. McMahon was specific in his statement respecting the limitations imposed on any information which might be given to the agent, Mr. Horton; who stated that he was commissioned "to make some ex-

aminations and get some information from the files of the paper." (R. 51) Mr. McMahon asked the purpose of the examination, and Mr. Horton stated "That he did not know; that he is merely a field agent." (R. 51) Mr. McMahon then told Mr. Horton that he "wanted to know whether or not the information that he was seeking was to be used by him in furtherance of any criminal prosecution". (R. 52) Mr. Horton stated that he did not know. (R. 52) Mr. McMahon then stated that he wanted "his examination (any examination made by Mr. Horton relating to the business of Mr. McMahon's client) to be definitely on condition that what he learned or what he copied or the information that he got from our files, the files of my client, were not to be used by him in furtherance of any criminal prosecution". (R. 52) Petitioners' attorney requested that the agent incorporate in the report the substance of their conversation and "the condition that I have attached to your going into these files". (R. 52)

Mr. McMahon further testified that he "undertook to get it (the condition which he had imposed) placed in writing in a sense that the gentleman would incorporate it in his report so that not only the examination that he was then conducting, but all future requests, would be goverened by the condition that he was supposed to put in that report. He told me he would put it in there". (R. 54)

Wherefore, petitioners pray that each and all of the subpoenas issued at the instance of Respondent be suppressed; that all and every paper and document obtained by Respondent from any search made by Respondent or its agents or otherwise obtained

by Respondent be ordered returned to Petitioners; that Petitioners have judgment sustaining their claims; that the order of the district court be affirmed; that all of Petitioners' papers and records in the possession of Respondent be returned to Petitioners; and that Petitioners have such other and further relief, general and special, in law and in equity, as Petitioners may be entitled to under the facts.

Respectfully submitted,

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Certificate of Service

I certify that on June 5, 1958, I served this petition for writ of certiorari by air mail upon the Solicitor General, Department of Justice, Washington 25, D. C. and upon Messrs. Victor R. Hansen, Assistant Attorney General, Daniel M. Friedman, Ernest L. Folk III, Henry M. Stuckey, and Paul A. Owens, Attorneys, Department of Justice, Washington 25, D. C., and upon Mr. Heard L. Floore, United States Attorney, Fort Worth 2, Texas, Attorneys for Respondent.

DAN MOODY
Attorney for Petitioners

APPENDIX A

Opinion of The Court Filed: April 24, 1958

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16927

UNITED STATES OF AMERICA,
Appellant,
versus

HARTE-HANKS NEWSPAPERS,
ABILENE, TEXAS, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

April 25, 1958.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal presents the validity *vel non* of an order of the court below, entered at the outset of a Grand Jury investigation, denying the Government the right to use before the

Grand Jury information obtained by its agents in their examination of the books of the appellees, Harte-Hanks Newspapers, Banner Publishing Company, Marshall Publishing Company, and Denison Herald, Inc. The court entered the order granting appllees' motions upon its finding that, prior to the issuance of the subpoenas duces tecum which the records were required to be produced before the Grand Jury, appellees had submitted to the Government for examination their books, records and files upon their understanding that they would not be used in connection with any criminal investigation or prosecution.

The trial court heard the testimony of three witnesses, Bruce Meador, a representative of the four corporations, T. J. McMahon, their attorney, and Ural E. Horton, Jr., Special Agent of the Bureau of Investigation, Department of Justice. The testimony was in sharp conflict. Meador and McMahon testified that, when the government agent requested the right to examine the books, records and files of the four newspapers, he was informed that these records would be submitted to him on condition that they be not used in connection with any criminal investigation or prosecution, and he was requested to note this condition in his report to the Government.

Horton testified that no such condition was expressed or discussed, that he advised Meador and McMahon that they had a right to refuse to produce the records if they desired, and advised them further that the records could be used against them by the Government, stating further that he did not know the purpose of the investigation then in progress. He

testified that he had no authority to promise any person that he would be "free from any prosecution" concerning any statements made or records furnished. He introduced a long letter adressed to him by Meador which listed the documents furnished and gave certain requested information. This letter, which accompanied Meador's delivery of the corporate records to Horton, made no mention of the condition testified by Meador and McMahon as having been imposed upon the surrender of the records to the Government. The letter also offered to furnish further information if requested to do so. The court resolved the conflicts between the witnesses in favor of appellees. [1]

We are not able to say that these findings of fact are clearly erroneous and we accept them as the predicate upon which our decision will rest. We recognize, however, as do the appellees, that there was

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[1] "After having heard the testimony however, and using the Chancellor's power to pass upon the credibility of the witnesses who have testified, I am of the opinion and find that the Defendants, who and which were being exposed for the divulgence of testimony which could be used before the Grand Jury in a criminal investigation; that such admonition and pledge was exacted by the attorney for these respective publications, and that that understanding, whether it was agreed to by the Government or not is quite immaterial. was to the effect that such information, as, is and was furnished, should not be used in any criminal investigation or by the Grand Jury for such purpose. . . .

". . . This is a country of great liberty, gentlemen, and we must all stand for it. This information must not be used before the Grand Jury for criminal investigation."

The court found further that the records covered by the subpoenas were to be used in connection with a projected criminal prosecution.

no express agreement between the Government and appellees, and that the "understanding" grew out of the conditional furnishing of the records and was an understanding held by appellees alone, it being "quite immaterial," in the court's mind, whether "it was agreed to by the Government."

The motions set forth the condition upon which the corporate records had been turned over to the Government,[2] and prayed solely that "the subpoenas be supressed and . . . said condition fully respected." The motions did not allege that any of appellees' constitutional rights had been violated, but the court, in its memorandum opinion, held that "constitutional provisions" would be violated if use of the records before the Grand Jury should be permitted.[3] The order of the court did not quash

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[2] "The request was made of one of the attorneys for one or more of the above named parties. Said attorney agreed to submit such letters, papers and records for examination by said representative upon the condition that none of them would be used in any manner in the prosecution of any action against any person or company or corporation named or referred to therein. Said papers were submitted to said representative of the Government upon the terms above stated. . . . The use of any of said papers in any attempted prosecution would be in violation of the conditions; and the Court should suppress the subpoenas and order that the above stated condition should be respected.

[3] "It seems quite unnecessary to cite authorities, because one of the fundamentals of a free government denies the right of the servants of the people to secure evidence, or testimony, in the manner indicated for use against the citizen. It would violate not only constitutional provisions, but the very thought of liberty and freedom itself."

or suppress the subpoenas, but commanded only that the restriction placed upon the use of the records by appellees be respected.'

What we have before us, therefore, is an order entered by the District Court at the beginning of a Grand Jury investigation which prohibited in advance the use before the Grand Jury of the information obtained by the government agent from appellees' records. In our opinion the order was without legal justification. Its language showed clearly that the denial of use of the records and information before the Grand Jury was predicated solely upon its declaration that the restrictions and conditions should be respected and enforced. These restrictions were unilateral only. Appellees knew that Horton was not advised of the purpose of the investigation and that, as a mere field agent, he had no authority to agree to any restrictions. The most appellees contend is that they requested that he advise the Government of the restrictions when he made his report. Appellees

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[4] "It is, therefore, the order and judgment of the Court, *that said restrictions and conditions be respected and enforced,* and that any information obtained by the Government Agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation." [Emphasis added.]

[5] Here is the way appellees deal with this question in their brief: "Appellees' attorney told Mr. Horton . . . that he 'wanted to know whether or not the information that he was seeking was to be used by him in furtherance of any criminal prosecution.' The agent stated that he did not know. Appellees' attorney then stated that he wanted the examination 'to be definitely on condition that what he learned or what he copied or the information that he got from the files, . . . were not to be used by him in fur-

did not follow up their request or withhold the records until they learned whether it would be respected --even if it be assumed that some agent of the Government had the authority to enter into such an agreement. Cf. *United States v. Ford, et al* (Whiskey Cases), 1878, 99 U. S. 594.

Appellees pitch their argument entirely upon the contention, not raised in their motions, that the evidence ought to be withheld from the Grand Jury on the ground that it was illegally obtained in violation of appellees' right under the Fourth and Fifth Amendments to the Constitution.

The Fifth Amendment, of course, does not apply to corporations,[6] and it is perfectly clear that the records were not obtained by any illegal search or seizure in contravention of the Fourth Amendment.[7]

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therance of any criminal prosecution.' The agent said that he did not know whether it . . . 'would be used in that manner or not;' and appellees' attorney then stated that he was sure the agent would file a report, and that he 'would appreciate it very much if you would incorporate in the report the substance of this conversation and the condition that I have attached to your going into these files.'"

[6] Genecov v. Fed. Pet. Bd., 5 Cir., 1944, 146 F. 2d 596, 597, cert. den. 324 U. S. 865; United States v. Bausch & Lomb Co., 321 U. S. 707, 762.

[7] Appellees cite in support of their Fourth Amendment contentions United States v. Wallace et al, 1949 336 U. S. 793; Silverthorn Lumber Co. v. United States, 1920, 251 U. S. 385; Weeks v. United States, 1914, 232 U. S. 383; McDonald v. United States, 1948, 335 U. S. 451; Go-Bart Importing Co. v. United States, 1931, 282 U. S. 344; and Judd v. United States, D. C. Cir., 1951, 190 F. 2d 649. Every one of the cases involved an actual forcible search of the premises of a litigant without warrant, and no case cited bears any resemblance on its facts or announces any principle which would support the action of the court below.

Horton entered the premises of appellees with the consent of Meador after having 'phoned for an engagement. Even under appellees' evidence, he made no threats or misrpresentations, employed no strategems, practiced no concealment, coercion or fraud. He did not sieze any records at all. They were delivered to him voluntarily by Meador two weeks after the request was made. Appellees and their attorney knew all the while that they had no assurance from the Government that any condition which might have been imposed would be honored. We find nothing in appellees' argument or in their authorities to justify the ruling of the court below.

It is established law that suppression of evidence prior to an indictment should be considered only when there is a clear and definite showing that constitutional rights have been violated. Cf. *United States v. Wallace*, *supra*, 336 U. S. 793, 796. And under our holding in *Eastus v. Bradshaw*, 1938, 94 F. 2d 788, the validity of his entire proceeding is subject to serious doubt. In *White v. United States*, 1952, 194 F. 2d 215, 217, cert. den. 343 U. S. 930, we held that one proceeding, as are appellees here, under Rule 41(e) Federal Rules of Criminal Procedure, could not hold the Internal Revenue Bureau, as a matter of contract, to its declared policy of granting immunity to persons making voluntary disclosure.

The office of the Grand Jury under our system is an important one, and its ability to function should not be limited by questions of propriety, *Blair et al v. United States*, 1919, 250 U. S. 273, 282, it being vital that it possess the power to conduct broad in-

vestigations[8] fettered only by the requirement that constitutional rights be not infringed.[9]

The order of the District Court granting the motions is reversed and the cause is remanded for the entry of an order denying them.

REVERSED AND REMANDED.

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[8] The Supreme Court in Costello v. United States, 1956, 350 U. S. 356, 362, indicated that the inquisitorial powers of the Grand Jury as was true of its English progenitor, should be so broad as to be free "from control by the Crown or judges."

[9] By the provisions of 15 U.S.C.A. §32 and §33 immunity is granted to any natural person testifying or producing records before a grand jury investigating possible violations of the anti-trust laws.

APPENDIX B

JUDGMENT

Extract from the Minutes of April 24, 1958

UNITED STATES OF AMERICA,

No. 16927

versus

HARTE-HANKS NEWSPAPERS,
ABILENE, TEXAS, ET AL

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for the entry of an order in accordance with the opinion of this Court.

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FILED
JUN 25 1958
JOHN T. FEY, Clerk

No. 1053

In the Supreme Court of the United States

OCTOBER TERM, 1957

HARTE-HANKS NEWSPAPERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
ERNEST L. FOLK, III,
Attorneys,
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. 23–30) is not yet reported. The opinion of the District Court is reported at 154 F. Supp. 68.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1958 (Pet. 31). The petition for a writ of certiorari was filed on June 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals correctly held that petitioners' documents had not been obtained through an illegal search and seizure, and that the District

Court therefore had erred in suppressing evidence prior to indictment.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

At the outset of a grand jury investigation of possible antitrust violations in the newspaper industry, petitioners moved to suppress grand jury subpoenas *duces tecum* calling for the production of designated corporate documents. The ground of the motion was that petitioners previously had made the documents available to government representatives "upon the condition that none of them would be used in any manner in the prosecution of any action" against them (R. 7, 24).

At the hearing on the motions McMahon, petitioners' attorney, testified that an agent of the Federal Bureau of Investigation (Horton), accompanied by petitioners' employee Meador, had called at his office and requested that he be permitted to examine certain specified documents (R. 51; see R. 44, 48); and that, in response to his questions, the agent had stated that "he did not know" either "the purpose of

the examination" (R. 51–52) or whether the material requested "was to be used by him [the agent] in furtherance of any criminal prosecution" (R. 52; see R. 46). McMahon "told him that since he did not know * * * [he] wanted his examination to be definitely on condition that what he learned or what he copied or the information that he got from our files * * * were not to be used by him in furtherance of any criminal prosecution" (R. 52). The agent again "stated that he didn't know whether it would be used in that manner or not." McMahon said that he would "appreciate it very much" if the agent would "incorporate in the report the substance of this conversation and the condition that I have attached to your going into these files" (R. 52, 46–47). The agent testified (R. 58–59) that he did not accept any offer to make the documents available upon "any condition or understanding or agreement."

McMahon then advised Meador to permit the agent to see the documents (R. 52). The agent did not obtain the documents, however, until two weeks later, and the letter of transmittal which accompanied them made no reference to the alleged condition (R. 63–66). McMahon testified that, after imposing the condition (R. 52), he had no "further discussions" with any government representative "about this matter" (R. 53), and that he did not seek to reduce the condition to writing (R. 54), apart from his request that the agent "incorporate [it] in [his] report" (R. 52).

The District Court found that the documents covered by the subpoenas "were secured * * * by an agreement with the complainants' attorneys * * * that the

papers should not be used before the grand jury in a criminal case," and that "to use such papers before the grand jury" "would violate not only constitutional provisions, but the very thought of liberty and freedom itself" (R. 32). The court entered an order providing "that any information obtained by the Government Agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation" (R. 77).

The Court of Appeals for the Fifth Circuit unanimously reversed, holding that "the order was without legal justification" (Pet. 27). Noting that "[i]t is established law that suppression of evidence prior to an indictment shall be considered only when there is a clear and definite showing that constitutional rights have been violated" (p. 29), the court ruled (p. 28) that "it is perfectly clear that the records were not obtained by any illegal search or seizure in contravention of the Fourth Amendment."

ARGUMENT

The decision of the Court of Appeals is clearly correct, and there is no occasion for further review by this Court. The court applied the settled rule, not challenged by petitioners, that the "extraordinary sanction" (*United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 796) of suppression of evidence prior to indictment may be utilized "only when there is a clear and definite showing that constitutional rights have been violated" (Pet. 29). See *Biggs* v. *United States*, 246 F. 2d 40, 42 (C. A. 6), certiorari denied,

355 U. S. 922; *Centracchio* v. *Garrity*, 198 F. 2d 382, 387 (C. A. 1), certiorari denied, 344 U. S. 866; *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657, 659 (C. A. 1).

The Court of Appeals correctly ruled (Pet. 28) that "it is perfectly clear that the records were not obtained by any illegal search or seizure in contravention of the Fourth Amendment."[1] As the court pointed out (Pet. 29),

> Horton [the FBI agent] entered the premises of appellees with the consent of Meador [petitioners' employee] after having 'phoned for an engagement. Even under appellees' evidence, he made no threats or misrepresentations, employed no stratagems, practiced no concealment, coercion or fraud. He did not seize any records at all. They were delivered to him voluntarily by Meador two weeks after the request was made. Appellees and their attorney knew all the while that they had no assurance from the Government that any condition which might have been imposed would be honored.

In sum, petitioners turned over the records freely and voluntarily, and not as a result of pressure or any other improper action by the FBI agent. The agent made no misrepresentations as to the use to which the documents might be put; on the contrary, petitioners' own witnesses conceded that he repeatedly stated that he did not know what would be done with them. Petitioners' attempt to impose a unilateral

[1] The court noted (Pet. 28) that the motions to suppress had not contended that the evidence had been obtained in violation of the Fourth Amendment.

condition upon the use of the documents—a condition which, the Court of Appeals noted (Pet. 27), the agent "had no authority to agree to"—did not convert this voluntary disclosure into an unlawful search or seizure justifying pre-indictment suppression of evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
ERNEST L. FOLK, III,
Attorneys.

JUNE 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958